FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 8, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	:	CIVIL PENALTY PROCEEDINGS
ALAN FOX, Employed by AMAX COAL CO., Respondent	:	Docket No. LAKE 95-298 A.C. No. 11-00877-4105 A
GARY W. BENNETT, Employed by AMAX COAL CO., Respondent	:	Docket No. LAKE 95-299 A.C. No. 11-00877-04104 A
CHARLES BURGGRAF, Employed by AMAX COAL CO., Respondent	:	Docket No. LAKE 95-300 A.C. No. 11-00877-04102 A
ELDON RAY EVANS, Employed by AMAX COAL CO., Respondent	:	Docket No. LAKE 95-338 A.C. NO. 11-00877-04103 A
	:	Wabash Mine

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Respondents.

Before: Judge Melick

These cases are before me upon the petitions 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 the named Respondents

as agents of corporate mine operator, Amax Coal Company (Amax), with knowingly authorizing, ordering or carrying out a violation of the mandatory standard at 30 C.F.R. § 75.400, on August 3, 1993. The Secretary seeks civil penalties of $2,600 each against Amax Shift Managers, Bennett, Evans and Fox and a civil penalty of $3,000 against Mine Manager Charles Burggraf.

Motion to Dismiss

In a preliminary motion, Respondents claim that these proceedings should be dismissed because the Secretary "unduly delayed the special investigation and the issuance of the proposed assessment of civil penalties and that delay has prejudiced their ability to defend themselves". The undisputed facts related to this claim are set forth below:

1. On August 3, 1993, MSHA inspector Arthur D. Wooten inspected the Wabash Mine and issued Order No. 4054387 to Amax Coal Company alleging a violation of 30 C.F.R. § 75.400, on the Main West No. 1 conveyor belt, pursuant to Section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 ("the Act"). The Order described the condition as follows:

> Accumulation of fine coal dust and loose coal was allowed to accumulate on the mine floor between the bottom belt and takeup pulleys of The Main West No. 1 conveyor belt drive. The accumulation of combustible material measured 18 inches in depth - 4 foot wide and 10 feet in length. The belt was running when this condition was observed with smoke coming from the friction areas.

AMAX did not contest the Order and paid the penalty it was assessed.

2. Mr. Burggraf was the mine manager for the North Portal or No. 1 of the Wabash Mine on the day when Inspector Wooten issued the Order.

3. Messrs. Fox, Bennett and Evans were shift mine managers at the Wabash Mine in and around the time of the issuance of the Order.

4. On August 12, 1993, MSHA District Manager Rexford Music recommended a preliminary special investigation be

conducted into a possible willful or knowing violation under Section 110(c) and (d) of the Act be conducted, with respect to Order No. 4054387. No such investigation was conducted. [reference omitted]

5. On April 28, 1994, Acting MSHA District Manager Fred Casteel recommended that a special investigation be conducted under Section 110(c) and (d) of the Act, with respect to Order No. 4054387.

6. On June 14-15, 1994, MSHA Special Investigator Curtis Haile first visited the mine to review record books. [reference omitted] He began to conduct interviews on July 12, 1994, but did not interview Respondents until July 29, 1994.

7. Special Investigator Haile submitted his report on August 3, 1994, to Lawrence M. Beeman, Chief, Technical Compliance and Investigation Division.

8. On January 19, 1995, the MSHA Solicitor's Office wrote Mr. Beeman indicating that it agreed with the recommendation to assess individual civil penalties against Respondents. [reference omitted]

9. On January 31, 1995, Mr. Beeman indicated in a memorandum from District Manager Music that a determination was made to propose a civil penalty against Respondents, pursuant to Section 110(c) of the Act. He noted that 18 months had elapsed since the Order was issued and suggested Mr. Music notify Respondents of MSHA's intention to assess individual penalties by telephone. [reference omitted]

10. On March 14, 1995, after a Health and Safety conference was conducted, Marvin W. Nichols, Jr., MSHA's Administrator for Coal Mine Safety and Health, directed Richard G. High, Jr. to assess civil penalties against the Respondents. [reference omitted] The proposed assessment of such penalties were [sic] issued on March 22, 1995. All Respondents, except Mr. Evans, contested such penalties on or about April 4, 1995. Mr. Evans contested such penalty on June 3, 1995, because of confusion over service of the proposed assessment.

11. On May 15, 1995, the Secretary filed the Petition for Assessment of Civil Penalty against all Respondents except Mr. Evans. The Petition against him was filed on

July 11, 1995.

Respondents argue that under Section 105(a) of the Act the delay that occurred before the Secretary proposed a civil penalty in these cases was unreasonable. In particular Respondents cite the following part of Section 105(a):

> If, after an inspection or an investigation, the Secretary issues a citation or order under Section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under Section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

Clearly, however, by its plain language, Section 105(a) is inapplicable to proceedings such as these initiated under Section 110(c) of the Act. Section 105(a) is precisely limited to penalty cases arising from citations or orders issued to mine operators under Section 104 and it refers specifically to notification only to the "mine operator". I further find inapposite the cases cited by Respondents regarding delays on the part of the Secretary in filing petitions for assessment of civil penalty under former Commission Rule 27(a), 29 C.F.R. § 2700.27(a) (now Rule 28, 29 C.F.R. § 2700.28). The issues in those cases arose from the failure of the Secretary to have filed petitions for assessment of civil penalty within 45 days of receipt of a timely contest of a proposed penalty assessment.

There is in fact no specific statute or regulatory time limitation for prosecuting violations under Section 110(c) of the Act. Moreover, it is the generally established law that unless a period of limitation is fixed by statute or regulation or unless there exist unusual circumstances of high prejudice, the prosecution of even criminal offenses is not barred by lapse of time. See 21 Am Jur 2d *Criminal Law* § 223. While the Respondents herein claim prejudice because of the Secretary's delay and, indeed, they have demonstrated some degree of prejudice, that prejudice was not to such a high degree as to have precluded viable defenses or to warrant dismissal.

Even assuming, *arguendo*, that the same factors the Commission considers in the context of Secretarial delays in filing penalty proposals under Section 105(a) are examined in relation to Section 110(c) cases, i.e. the reason for the delay and prejudice to the operator, the Respondents' motion would

nevertheless fail. This Commission has generally accepted Secretarial delays caused by his heavy caseloads and the lack of budgetary resources and manpower to handle those caseloads. See *Steele Branch Mining,* 18 FMSHRC ___, Docket No. WEVA 92-953, slip op. January 25, 1996; *Salt Lake County Road Dept.,* 3 FMSHRC 1714 (July 1981) and *Medicine Bow Coal Co.,* 4 FMSHRC 882 (May 1982). The Secretary has evidentiary support for such reasons in these cases. In addition, as noted, while Respondents have demonstrated some degree of prejudice from the delay herein it is not of the severity warranting dismissal.

Under the circumstances the Respondents' motion to dismiss is denied.

The Merits

Section 110(c) of the Act subjects certain individuals to civil penalties if the Secretary can sustain his burden of proving that: (1) a corporate operator committed a violation of a mandatory health or safety standard (or an order issued under the Act); (2) the individual was an officer, director, or agent of the corporate operator; and (3) the individual "knowingly authorized, ordered, or carried out" the violation.

A violation by the corporate operator must be established and such violation must be proved in the proceeding against the individuals. *Kenny Richardson*, 3 FMSHRC 8, 10 (January, 1981), aff'd sub nom. *Richardson v. Secretary of Labor,* 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). The Secretary also has the burden of proving that the person charged is an agent of the corporate operator. Under Section 3(e) of the Act "agent" is defined as "any person charged with responsibility for the operation of all or part of a coal or other mine, or the supervision of miners in a coal or other mine."

Finally, the Secretary must prove that the agent "knowingly authorized, ordered or carried out" the violation. The appropriate legal inquiry in this regard is whether the corporate agent "knew or had reason to know" of the violative condition. *Secretary v. Roy Glenn*, 6 FMSHRC 1583, 1586 (July 1984), *citing Kenny Richardson,* 3 FMSHRC 8, 16 (January 1981). In *Kenny Richardson,* the Commission stated:

> 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.

3 FMSHRC at 16. In order to establish section 110(c) liability, the Secretary must prove only that the individuals knowingly acted, not that the individuals knowingly violated the law. *Beth Energy Mines, Inc.,* 14 FMSHRC 1232, 1245 (August, 1992). In *Roy Glenn,* 6 FMSHRC 1583 (July, 1984), the Commission held, however, that something more than the possibility of an underlying violation must be shown to establish "reason to know". 6 FMSHRC at 1587-8. Moreover, a "knowing" violation requires proof of aggravated conduct and not merely ordinary negligence. *Wyoming Fuel Co.,* 16 FMSHRC 1618, 1630 (August, 1994)

The underlying violation in these cases as charged in Order No. 4054387 does not appear to be in dispute. As noted, the order was issued on August 3, 1993, at 9:25 a.m., about five minutes after the issuing inspector arrived at the belt entry and discovered the described condition. The order charges as follows:

> Accumulations of fine coal dust and loose coal was allowed to accumulate on the mine floor between the bottom belt and takeup pulleys of the Main West No.1 conveyor belt drive. The accumulation of combustible material measured 18 inches in depth - 4 foot wide and 10 feet in length. The belt was running when this condition was observed with smoke comming [sic] from the friction areas.

The cited standard, 30 C.F.R. § 75.400, provides that [c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Neither the dimensions, the location nor the content of the cited accumulation appear to be disputed. Moreover, it is not disputed that the belt, in close proximity to the accumulations, was found rubbing on the belt frame resulting in friction heat. The issuing inspector speculated that both the accumulations and the belt frame were so hot that they could not be touched. There is no dispute that coal was then being produced and transported on the belt. The uncontradicted evidence is clearly sufficient to establish that the violation existed as charged. However, even assuming, *arguendo,* that each of the Respondents was an "agent" of the corporate operator during relevant times, I do not find that the Secretary has met his burden of proving that any of them "knowingly" authorized, ordered, or carried out the violation.

In these cases the Secretary claims that Respondents "knew or had reason to know" of the cited violation based on an inference from prior pre-shift examiners' reports that conditions at the cited takeup "needed cleaning". For several reasons I find that no such inference can properly be drawn. First, the Secretary would necessarily have to prove that such earlier conditions had not been cleaned.[1] In this regard, contrary to the Secretary's position, I do not find that the absence of on-shift report entries prior the last pre-shift report filed at 7:00 a.m. on August 3, 1993, established that the noted conditions had not been cleaned up. The Secretary argues that from the absence of such entries corresponding to pre-shift entries showing the need to clean the cited area (at least following the last reported cleanup in the on-shift report for the day shift on August 1, 1993) it may reasonably be inferred that those conditions had not, in fact, been cleaned. However, in light of the credible and undisputed evidence that it was not then the practice at the Wabash Mine to always report in the on shift books when such conditions were cleaned no such inference

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[1] It is also significant that the Secretary has never proven that any of the conditions noted in those prior pre-shift examiners' reports, to the effect that the areas "needed cleaning" or words to that effect, were actually in themselves violative conditions. The Commission has held that whether coal spillage constitutes an accumulation depends on the amount and

Footnote 1 Continued

size of the spillage. *Old Ben Coal Company,* 1 FMSHRC 1954 (December, 1979). The Commission has also held that a violative "accumulation" exists where the quantity of combustible materials is such that, in the judgement of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source is present. *Old Ben Coal Company,* 2 FMSHRC 2806, 2808 (October 1980). In none of the pre-shift examiners' reports where areas were noted as "needing cleaning" was an evaluation made that could be reviewed to determine whether a reasonably prudent person familiar with the industry and purposes of the regulation would have recognized the conditions as hazardous. See *Utah Power and Light Company*, 12 FMSHRC 965, 968 (May 1990). Thus the pre-shift reports themselves cannot and did not establish that violative accumulations had existed at any time prior to the issuance of the order at bar.

may properly be drawn.[2] It is noted, moreover, that corrective action following a report by a pre-shift examiner is not required to be recorded in the on-shift books by the Secretary's regulations. Thus, the pre-shift reports indicating that certain areas "needed cleaning" supports neither the inference that violative conditions then existed nor that such conditions had not thereafter been cleaned up.

The credible evidence shows, moreover, that it was the accepted practice at the Wabash Mine for pre-shift examiners to verbally notify the shift manager of any hazardous condition if it was deemed necessary. The fact that none of the pre-shift reports indicating that cleaning was needed were apparently brought to the attention of the shift managers in this manner further suggests that the areas noted as needing cleaning were neither violative "accumulations" within the meaning of the *Old Ben* decisions nor that they needed immediate attention.

Finally, the credible record and undisputed evidence establishes that, following the pre-shift report filed at 7:00 a.m. on August 3, 1993, and before the order at bar was issued, outby Foreman Mike Baize, an assistant to Respondent Evans, directed a miner to clean the specific takeup area noted in that pre-shift report. Evans testified that Baize was also delegated the responsibility to countersign the pre-shift report that morning because he (Evans) was scheduled to attend a meeting with Mine Foreman Burggraf at the beginning of the shift. Baize, who has since become employed "somewhere" in Arizona and was presumably, therefore, unavailable to testify, told Evans that he had assigned miner Mike Riley to clean the cited takeup area before the order was issued. It was later observed that a protective guard had been removed from the takeup, presumably in preparation for the cleanup, but apparently either no one completed the job or additional spillage occurred before 9:25 that morning when the order was issued.

It is also apparent that the conditions cited by the MSHA inspector at 9:25 a.m. on August 3 were considerably more serious than when the same area was inspected by the pre-shift examiner between 5:00 and 6:45 that morning (Exhibit R-11, page 160). It was later discovered that defective pillow bearings had caused the belt to become misaligned. It may reasonably be inferred that such misalignment could have rapidly caused the cited

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[2] It is noted that the practice at the Wabash Mine has been since changed so that reports are apparently now made in the on-shift books when such reported conditions have been cleaned.

accumulation as well as the heat and smoke generated by the belt rubbing on its frame. It may also reasonably be inferred that these severe conditions had not existed at the time of the pre-shift examination, because, in accordance with mine procedures and common sense, the examiner would no doubt have taken immediate action and have reported such serious conditions in the pre-shift report. Significantly, the belt had previously been aligned (trained) only shortly before, on the August 2 midnight shift. Consistent with this evidence it is noted that Burggraf testified that he had no notice of the severity of conditions found by the inspector at 9:25 a.m. on August 3, 1993.

It is also significant that pre-shift mine examiner Robert Orr, who was familiar with the cited area on a daily basis, stated that he was not concerned in late July and early August 1993 about the takeup and the material he found there. He was, in fact, apparently surprised that the order was issued because he had not observed, in the two weeks before this, anything suggesting that the takeup area warranted an order.

Under all the circumstances, I do not find that any of the Respondents "knew or had reason to know" of the violative condition cited in Order No. 4054387.

In reaching this conclusion, I have not disregarded the Secretary's other argument that the purported statements by MSHA personnel to Evans and Burggraf on July 12 and July 2, respectively, regarding cleanup problems at the mine, established that Respondents "knew or should have known" of the specific violation on August 3. However, the alleged statements were not at all specific to the belt at issue and there were 20 miles of belt at this mine nor to the specific problem identified as causing the violation herein, i.e. the misalignment of the belt caused by a defective bearing. In addition, these statements were not sufficiently time related to the incident at bar to bear any compelling weight on the issue. Moreover, in light of the totality of credible evidence previously discussed, I can give but little weight to the speculation of the issuing inspector that the cited accumulation had been present for more than a day.

Under the circumstances, the charges against the Respondents herein under Section 110(c) of the Act must be dismissed.

ORDER

These civil penalty proceedings are hereby dismissed.

Gary Melick
Administrative Law Judge

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