FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 7, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. MICHAEL GRIFFITH, II, Employed by TEAL MINING, INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. VA 94-64 A.C. No. 44-06483-03536 A Mine No. 1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. MICHAEL GRIFFITH, Employed by by TEAL MINING, INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. VA 94-65 A.C. No. 44-06483-03538 A Mine No. 1

DECISION

Appearances: Edward H. Fitch, Esq., Office of the
Michael Griffith and Michael Griffith, II, Jewell
Ridge, Virginia, pro se.

Before: Judge Melick

These cases are before me upon 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 Michael Griffith and his son, Michael Griffith, II as agents of corporate mine operator Teal Mining, Incorporated (Teal Mining) with knowingly authorizing, ordering or carrying out three admitted violations of mandatory standards and seeking civil penalties of $2,200 and $2,800 respectively. The general issues before me are whether Michael Griffith and/or Michael Griffith, II were agents of the corporate mine operator as alleged and, if so, whether they knowingly authorized, ordered or carried out the admitted violations. If the above issues are resolved in the affirmative, then it will be necessary to determine appropriate civil penalties to be assessed

considering the relevant criteria under Section 110(i) of the Act.

As a preliminary matter it should be noted that seven exhibits (Government Exhibit Nos. 11 - 17) offered by the Secretary and admitted at hearing under Commission Rule 63, 29 C.F.R. ' 2700.63, are given no weight in this decision. The exhibits consist of summaries of witness interviews prepared from the notes of an investigator for the Mine Safety and Health Administration (MSHA). The subjects of these interviews were neither subpoenaed nor called to testify at hearings on the charges against these pro se Respondents nor does it appear that Respondents had any notice before hearing that the Secretary would be offering these interview summaries as evidence. The Respondents are also each charged with three quasi-criminal violations under Section 110(c) of the Act[1] subjecting them to $150,000 in penalties each under Section 110(a) of the Act. Under the circumstances they are entitled to a federal constitutional right of confrontation. *Maryland v. Craig,* 497 U.S. 836 (1990); *Greene v. McElroy*, 360 U.S. 474 (1959); *Goldberg v. Kelly*, 397 U.S. 254 (1970). See also David B. Sweet, Annotation, *Federal Constitutional Right to Confront Witnesses - Supreme Court Cases,* 98 L. Ed. 2d 1115.

The inability of the Respondents to confront and cross examine these critical witnesses at hearing and thereby test

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[1] Section 110(c) provides as follows:

Whenever a corporate operator violates a mandatory health c final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), 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).

their recollection and the accuracy of their purported statements and to compel them to stand before this tribunal to test their demeanor would constitute a denial of due process.

As the Supreme Court stated in *Greene v. McElroy:*

"Certain principles have remained relatively immutable in our juri depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e.g., *Mattox v. United States*, 156 US 237, 242-244, 39 L ed 409-411, 15 S Ct 337; *Kirby v. United States*, 174 US 47, 43 L ed 890, 19 S Ct 574; *Motes v. United States*, 178 US 458, 474, 44 L ed 1150, 1156, 20 S Ct 993; Re Oliver, 333 US 257, 273, 92 L ed 682, 694, 68 S Ct 499, but also in all types of cases where administrative and regulatory actions were under scrutiny. E.g., *Southern R. Co. v. Virginia*, 290 US 190, 78 L ed 260, 54 S Ct 148; *Ohio Bell Tel. Co. v. Public Utilities Com.* 301 US 292, 81 L ed 1093, 57 S Ct 724; *Morgan v. United States*, 304 US 1, 19, 82 L ed 1129, 1133, 58 S Ct 773, 999; *Carter v. Kubler,* 320 US 243, 88 L ed 26, 64 S Ct 1; *Reilly v. Pinkus,* 338 US 269, 94 L ed 63, 70 S Ct 110. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 US 123, 168, 169, 95 L ed 817, 852, 71 S Ct 624 (concurring opinion).

Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, *5 Wigmore on Evidence* (3d ed. 1940) ' 1367:

"For two centuries past, the policy of the Anglo- Americar safeguard for testing the value of human statements is comparable to that furnished by cross- examination, and the conviction that no statement (unless by special exception)

should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

The limited exception to the right to confrontation provided under certain circumstances for the admission of written reports by an examining physician in certain administrative proceedings set forth in *Richardson v. Perales,* 402 U.S. 389, (1971), is, of course, not applicable to these cases. Under the circumstances and within the above framework of law, it would be constitutionally impermissible to give any weight to the seven interview summaries at issue.

Even assuming, *arguendo*, there is no constitutional infirmity in giving weight to these exhibits, they are, in any event, untrustworthy and entitled to no weight. These interview summaries were not taken under oath, were not signed nor apparently reviewed by the purported authors, and, indeed, are not even verbatim statements but only summaries of interviews based upon the investigator's notes. It appears, moreover, that language attributed to witnesses may have actually been authored by the special investigator himself -- for example, the reference to "the controversial conversations" attributed to Richard Roberts (Government Exhibit No. 14, page 2). The investigator also acknowledged that on at least four occasions in the statement of one witness he failed to accurately attribute statements to their true author, i.e. statements purportedly of Michael Griffith, II, attributed to Michael Griffith, Sr. (Government Exhibit No. 10, page 2). In addition, the investigator acknowledged that, while apparently relying upon the statement of Howard Cordle in reaching investigative conclusions, he did not find the statement to be "100 percent truthful". Accordingly, the inaccuracy and lack of credibility of these exhibits undermines their potential probative value. They would, therefore, in any event, be entitled to no weight.

As previously noted, the underlying violations charged in these cases and incorporated in Citation No. 4002030, and Orders Nos. 4002031 and 3799489 are not disputed. Citation No. 4002030 alleges a February 9, 1993, violation of the approved mine ventilation plan under the mandatory standard at 30 C.F.R. ' 75.370(a)(1) and charges as follows:

The main return from the surface to the 2nd right mains was not maintained to ensure safe passage at all times of persons, approximately 40 inches. Foreman Howard Cordle stated that he knew of the conditions, water accumulations was observed and citations issued during the last inspection. The approved

ventilation, methane and dust control plan requires that return entries be maintained free of water to ensure safe passage.

In relevant part the applicable ventilation plan provides as follows:

> Water which will inhibit safe travel or bleeder function shall nc

Order No. 4002031 alleges a violation of the same provisions of the mine ventilation plan on February 9, 1993, but charges as follows:

> The ventilation, methane and dust control plan was not being complied with. The bleeder entries provided for the 3rd left par accumulate from 15 inches to 40 inches in depth, beginning 60 feet inby survey station number 553 and extended [sic] inby for an unknown distance. The results of the weekly examinations conducted by
> Edward Cordle, Foreman, on 02-07-93 stated he could not travelec

Order No. 37949489 alleges a June 3, 1993, violation of the mine operator's roof control plan under the mandatory standard at 30 C.F.R. ' 75.220 and charges as follows:

> The approved roof control plan was not being complied with in that survey station No. 1351 and extending inby to the face. Also the last row of roof bolts in the face is 6 to 8 feet outby the face. The approved roof control plan sketch shows the entry not to exceed 20 feet in width and roof bolts installed within 4 feet of the face.

It is undisputed that the operator's roof control plan limits entries, including the belt conveyer entry at issue herein, to a width of 20 feet (Government Exhibit No. 18).

There is no dispute that as of March 18, 1993, Michael Griffith (senior) became a corporate officer of Teal Mining, namely Secretary/Treasurer and remained in that capacity at the time of the June 3, 1993, violation charged in Order No. 3799489. (Government Exhibit No. 19). He was, therefore, in a category of agent specifically set forth in Section 110(c) of the Act as of
the date of the June 3, 1993, violation. The Secretary maintains that Griffith (senior) was also an agent of Teal Mining when the two violations were committed on February 9, 1993, based upon the observations of the issuing inspector (Inspector Roger Vance) and

upon the interview summaries (Government Exhibit Nos. 11-17) which I have found to be entitled to no weight.[2]

The term "agent" is defined in section 3(e) of the Act as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." In attempting to show the agency status of Michael Griffith (senior) the Secretary argues, but without explanation or record support, that the "relationship that existed between him and his son clearly implied an agency in fact." In addition, the Secretary maintains that Griffith's presence at the mine was "consistent throughout the time that the mine was opened." The secretary again fails, however, to cite any credible record evidence to support this conclusion or show how that evidence in any event supports a finding of "agency". Indeed, aside from his own admissions that he was around the mine beginning in October 1992 and in January, the only credible evidence that Griffith (senior) was present on any particular date came through the testimony of MSHA Inspector Roger Vance. Vance testified that, at the time of his inspection on October 21, 1992, he saw Griffith (senior) at the mine but at that time he was performing only work as a mechanic. The only other time Vance had observed Griffith (senior) at the mine was during the February 9 inspection when Griffith, who was then apparently incapacitated by injuries, was present but apparently not performing any work. While this evidence does indicate that Griffith (senior) was present at the mine on occasion this presence, standing alone without any evidence that he was then "charged with any responsibility for the operation of all or a part" of the mine or with the "supervision of the miners" is hardly sufficient to establish his agency under the Act at the time of the February 9, 1993, violations.

Griffith's lack of involvement in a responsible capacity is further supported by his own testimony that he had nothing to do with his son's mine until around October (presumably 1992) when he volunteered to help as a mechanic/electrician to keep the equipment operating. Michael Griffith, II corroborated his father's lack of authority at the mine characterizing his initial participation as that of an advisor. Griffith, II hired certified mine foremen, Coleman, Cordle and later Dye to run the

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[2] The parties were advised by notice issued April 5, 1995, that their briefs should be based upon evidence other than Government Exhibit Nos. 11-17).

mine since he personally had no knowledge of the mining business. He maintains that his father was never an employee and was not paid for any work at the mine.

The Secretary next argues, but without specifying any relevant time period, that Griffith (senior) was "clearly viewed as an owner of the mine by many of the miners as well as by an inspector". The basis for the Secretary's conclusion in this regard appears, however, to be the interview summaries which I have found to be entitled to no weight, and the testimony of Griffith himself that, at some point in time Randy Dye, one of the other foremen, may have thought of him as a supervisor (Tr. 279-280). This somewhat ambiguous testimony is hardly sufficient, however, to establish the status of Griffith (senior) as an "agent" as of the February 9, 1993, violations.

Finally the Secretary maintains that Griffith (senior) was an agent because he and his son "never sought to tell the miners that the father was not an owner of the mine." Under this novel argument the Secretary is impermissibly attempting to shift his burden of proof to the Respondent himself to prove he was not an agent. Carried to its logical conclusion, the Secretary would argue that the failure of Respondents to have declared to miners that they were not "agents" makes them agents by default. Under all the circumstances I find that the Secretary has failed to sustain his burden of proving that Mr. Griffith (senior) was an "agent" of the corporate operator on February 9, 1993. Accordingly, the charges against him for activities as an "agent" on that date as set forth in Citation No. 4002030 and Order No. 4002031 must be vacated.

With respect to the violations, charged against Michael Griffith, II in Citation No. 4002030 and Order No. 4002031, the Secretary argues that he "knowingly" acted or committed the violations based on his testimony that he knew the water was being pumped out of the mine.[3] In this regard the Secretary relies on the following colloquy at hearing:

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[3] The term "knowingly" is evaluated within the framework of the Commission decision in *Secretary v. Kenny Richardson*, 3 FMSHRC 8 at 16 (1981) aff'd on other grounds 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). In that case the Commission stated as follows:

"If a person in a position to protect employee safety and health f knowingly and in a manner contrary to the remedial nature of the statute."

"Q. [by attorney Fitch] Well, why didn't you have the returns

A. Well, I didn't know they wasn't clear of water, to be honest. coming out, to work on the pump, make sure it's pumping water." (Tr. 255)

I do not agree that the above testimony supports a finding that Griffith, II knowingly acted or violated the ventilation plan. To the contrary, the testimony shows that Griffith was aware that water was continually being pumped outside and, indeed, that they were making continuing efforts in an attempt to comply with the ventilation plan. Moreover, the cited provision of the ventilation plan may reasonably be construed as requiring only that "water which will inhibit safe travel or bleeder function . . . shall be pumped or drained."

In these cases the Secretary does not dispute that mine production had already been discontinued and that the water was being pumped out of the mine, but argues only that, in his opinion, the pumps being used were inadequate to pump the water fast enough. This determination is clearly a judgment call about which reasonable persons may disagree and is not the sort of judgment sufficient to warrant a "knowing" violation under Section 110(c). When this evidence is considered in conjunction with Respondent's clear lack of knowledge and experience in the industry and the reliance he placed upon the certified mine foremen he hired, I find the Secretary has not sustained his burden of proving the charges herein. Under the circumstances, both charges against Michael Griffith, II, set forth in Citation No. 4002030 and Order No. 4002031 must be vacated.

With respect to the violation alleged to have occurred on June 3, 1993, (Order No. 37949489) the Secretary, in his post-hearing brief, cites no evidence to support a finding that the Respondents "knowingly" acted or violated the law or that they were even aware of the conditions cited. Inspector Paul McGraw, testified that he discovered the violation during his June 3, 1993, inspection and found that the entry was 21 to 22 feet wide over 150 feet in linear distance. McGraw acknowledged that he did not have an opportunity to talk to either of the Griffiths about this violation. According to McGraw, section foreman Howard Cordle told him that he thought the belt entry could, in fact, be cut 22 feet wide.

Michael Griffith, II testified that he had no mining experience before entering into the business herein and later hired and relied upon Howard Cordle to run the mine. Michael Griffith (senior) confirmed that his son knew nothing about mining and, indeed, initially warned his son to stay away

from the mine since he knew nothing about the business. Griffith (senior) testified that at first he had nothing to do with the mine but, beginning around October, helped by trying to keep the equipment operating. Around March 1993, apparently after he became Secretary/Treasurer, he began signing pay checks along with his son. After the instant violation was issued, he asked Cordle about mining with a 22-foot-wide entry. According to Griffith (senior), Cordle stated that he thought it should be 22 feet wide because that was the way he cut it at another operation.

Based upon the paucity of evidence regarding Michael Griffith, senior's authority, participation and knowledge surrounding the instant violation, I cannot find that he "knowingly" acted or violated the cited requirements of the roof control plan. Accordingly, the charges against Michael Griffith (senior) in this regard, must be vacated.

With respect to the allegations that Michael Griffith, II knowingly violated the roof control plan under Order No. 37949489, the Secretary has again failed to cite any evidence to support the charges. Indeed, this appears to be for good reason for there is, in fact, insufficient evidence to support charges against Michael Griffith, II for knowingly acting or violating the requirements of the corporate operator's roof control plan as charged.

ORDER

The charges set forth herein against Michael Griffith and Michael Griffith, II, are hereby vacated and these civil penalty proceedings are dismissed.

Gary Melick
Administrative Law Judge

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