

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 18, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 95-17
Petitioner	:	A. C. No. 44-06240-03590 A
v.	:	
	:	Mine No. 1
GARY WAYNE CRABTREE, Employed	:	
by J&E COAL COMPANY	:	
INCORPORATED,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 95-18
Petitioner	:	A. C. No. 44-06240-03591 A
v.	:	
	:	Mine No. 1
DANNY KEITH CRABTREE, Employed	:	
by J&E Coal Company	:	
INCORPORATED,	:	
Respondent	:	

**DECISION**

Appearances: Colleen A. Geraghty, Esq., Office of the  
Solicitor, U.S. Department of Labor, Arlington,  
Virginia, for Petitioner;  
Gary Wayne Crabtree, Honaker, Virginia, *Pro Se*;  
Danny Keith Crabtree, Honaker, Virginia, *Pro Se*.

Before: Judge Hodgdon

These consolidated cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Gary Wayne Crabtree and Danny Keith Crabtree pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. " 815 and 820. The petitions allege that each of the respondents knowingly authorized, ordered or carried out, as an agent of J&E Coal Company, violations of Sections 75.400 and 75.403 of the Secretary's mandatory health and safety standards, 30 C.F.R. " 75.400 and 75.403, and seek penalties of \$1,400.00 against each Respondent. For the reasons set forth below, I find that Danny Keith Crabtree knowingly violated the

regulations and assess a penalty of \$400.00, and that Gary Wayne Crabtree knowingly violated Section 75.403, but did not knowingly violated Section 75.400, and assess a penalty of \$400.00.

A hearing was held on July 11, 1995, in Abingdon, Virginia. MSHA Coal Mine Inspector Vearl Hileman, MSHA Supervisor Larry A. Coeburn, MSHA Special Investigator Michael D. Clements and miner Roy W. Honaker testified for the Secretary. Respondent Gary Wayne Crabtree was called as a witness by the Secretary and testified further at the request of the judge.

#### **DANNY KEITH CRABTREE**

At the start of the hearing, counsel for the Secretary stated that the Secretary and Danny Keith Crabtree had reached a settlement in his case. The agreement provides for a reduction in penalty from \$1,400.00 to \$400.00 and payment of the penalty by Mr. Crabtree in two monthly installments of \$200.00 each.

Having considered the representations of the parties, (Tr. 5-9), I conclude that the settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. ' 820(i), and approve the settlement. The agreement's provisions will be carried out in the order at the end of this decision.

#### **GARY WAYNE CRABTREE**

On May 9, 1994, Inspector Hileman issued Citation No. 3770559 and Order No. 3770560 to J&E Coal Company. The citation alleged a violation of Section 75.400 because an

[a]ccumulation of loose coal and coal dust was allowed to accumulate in depths of 1 inch to 18 inches along the Long John belt on the 001 section, on the mine floor for a distance of approximately 300 feet, and into x cuts right and left. Accumulations were on the mine floor over the entire section in depths of 1 inch (approximately). A large quantity was present at Survey Section No. 2831 and outby in several locations.

(Govt. Ex. 1.) The citation was modified on June 8, 1994, to include A the area of the conveyor belt drive on the No. 3 conveyor belt and extending inby for a distance of 900 feet. Accumulations of 1 inch to 5 inches were present along the off side of the conveyor belt, on the mine floor.@ (Id.)

The order was for a violation of Section 75.403, stating that A[r]ock dust has not been applied to the mine roof on the 001 section[.] [A]dequate rock dust has not been applied to the mine floor as indicated by samples collected on this date[.]

[T]he area affected is aprox. [sic] 300 feet in each of the 5 entries [sic]. Also bare power wire was found at the battery charging station (energized) in dry powdery coal dust.@ (Govt. Ex. 2.)

Inspector Hileman testified that Danny Keith Crabtree was foreman on the day shift and was present on the morning of May 9 when the inspector observed the violations. The inspector stated that **A**there was quite an accumulation of coal along the [No. 3] belt line . . . one inch up to maybe 10 . . . [for] approximately 600 feet,@ (Tr. 20-21.), **A**there was extreme accumulations of coal . . . 18 inches of coal@ in a large dip in the coal bed in the conveyor belt entry, (Tr. 22-23), in the No. 2 entry he **A**found the same conditions as I found along the belt,@ (Tr. 24), and that in all the entries he found **A**[t]he same conditions that I had found in the No. 2 entry and the No. 3 entry,@ (Tr. 25).

It was the inspector's opinion that **A**it would have taken several weeks@ for the accumulations to have developed. (Tr. 26.) He believed that the accumulations had occurred:

By not being properly cleaned up as they mined daily. . . . There was other factors. The bridge system has junctions where the coal dumps from one bridge to the other, and at the junction points there is supposed to be adequate skirting there to keep the spillage from spilling. This skirting had become deteriorated to quite an extent. It was causing a lot of spilling.

(Tr. 26-27.) **He further related that the accumulations were very black in appearance, and dry.**

With regard to the failure to rock dust, Inspector Hileman testified that for **A**300 feet in each of the five entries@ the roof was **A**[d]ark. Actually it was -- it looked gray because you don't usually have any coal dust on the mine roof to an extreme, but still have to rock dust it.@ (Tr. 34-35.) He also said that in the same areas the mine floor and the ribs were **A**black.@ (Tr. 35.) To confirm his opinion, he took dust samples in the No. 3 and No. 4 entries which were determined to be 37 percent and 28 percent incombustible, respectively. (Govt. Ex. 4.)

Gary Wayne Crabtree testified that he was the foreman on the evening shift, 3:00 PM to 11:00 PM. He stated that the duties of the evening shift were: **A**Well, we were mostly maintenance, and then we done what cleanup, if there was some cleanup needed to be done we done cleanup, and we did mostly -- well, I can't really say all the rock dusting, but generally most of the rock

dusting.@ (Tr. 79.)

He asserted that he saw **Nothing unusual@** in the way of coal accumulations while performing his on-shift examination on May 6, 1994, although he did see some accumulations because **Athere's coal** in the coal mines. . . . And you will see coal, you know, when you're in the coal mines. You'll see some coal.@ (Tr. 81.) Mr. Crabtree testified that the floor and ribs of the mine were rock dusted by hand using the following method: **AYou just open up a bag, and you just spread it out on the ribs, you know. And on the bottom, you kind of bust them up and then just kick them around.@** (Tr. 82.) He agreed that there **Almost definitely@** is a visual difference between ribs and floor that have been rock dusted and ones that have not. (Tr. 85.)

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was brought under Section 110(c) of the Act, 30 U.S.C. ' 820(c) which provides:

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 . . . that may be imposed upon a person under subsections (a) and (d). Therefore, in order to find Gary Wayne Crabtree personally liable for the two violations in this case, the Secretary must prove that the violations occurred and that Mr. Crabtree knowingly authorized, ordered, or carried them out.

In this case, there is no doubt that the company violated Sections 75.400<sup>1</sup> and 75.403<sup>2</sup> of the Secretary's Regulations. However, while I find that Gary Wayne Crabtree knowingly violated

---

<sup>1</sup> Section 75.400 states: **ACoal dust, including float coal dust on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleared up and not be permitted to accumulate in active workings, or on electric equipment therein@**

<sup>2</sup> Section 75.403 states:

**Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the combustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the combustible content in the return air courses shall be no less than 80 per centum.**

Section 75.403, I find that the Secretary has not proven that he knowingly violated Section 75.400.

The Commission set out the test for determining whether a corporate agent has acted knowingly in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983) when it stated: "If a person in a position to protect 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."

In *Roy Glenn*, 6 FMSHRC 1583 (July 1984), the Commission explained that this test also applies to a situation where the violation does not exist at the time of the agent's failure to act, but occurs after the failure. It said:

Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted knowingly, in violation of Section 110(c) when, based on the facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventive steps.

*Id.* at 1586. The Commission has further held, however, that to violate Section 110(c), the corporate agent's conduct must be aggravated, i.e. it must involve more than ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (August 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

In this case, the evidence does not support a finding of aggravated conduct on the part of Mr. Crabtree with respect to the accumulations. In the first place, there is no direct evidence what accumulations, if any, there were on the second shift the Friday before the inspector inspected the mine. Mr. Crabtree says there was nothing unusual. In the second place, it appears that the worst accumulations were along the belt lines, which Mr. Crabtree says he did not inspect. Finally, since the first shift had already been working for about two hours when Inspector Hileman entered the mine, there is no way to determine how much of the accumulations had occurred that morning.

Ultimately, whether Gary Wayne Crabtree knowingly violated Section 75.400 depends on whether one accepts his opinion or the

inspector's opinion. In view of the factors set out in the preceding paragraph, I will give Mr. Crabtree the benefit of the doubt and resolve the issue in his favor. Consequently, I conclude that he did not knowingly authorize, order or carry out the violation.

The same cannot be said, however, for the violation of Section 75.403. This violation occurred in the entries, an area the foreman was supposed to examine, not along the beltlines. As Mr. Crabtree admitted, one of the main jobs of the second shift was to rock dust. Furthermore, his testimony was less precise than about the accumulations in that he talked about rock dusting in general and not with regard to the specific occurrence. Finally, his description of how the second shift rock dusted shows that the job was not taken seriously, but was performed only half-heartedly.

When this is considered against the description by Inspector Hileman of the color of the entries that he observed on Monday morning, as well as against the results of the dust samples, taken 90 to 100 feet outby the working faces, which showed a significant deficiency of rock dust in the entries, it is apparent that little or no rock dusting had been done recently. As Mr. Crabtree acknowledged, it is easy to tell an area of the mine that has been rock dusted from one that has not.

All of this establishes that Gary Wayne Crabtree knew or should have known that proper rock dusting was not being performed and took no action to correct it. Since one of his main functions was to see that this was done, I conclude that he knowingly authorized the violation of Section 75.403.

#### **CIVIL PENALTY ASSESSMENT**

The Secretary has proposed a penalty of \$600.00 for the violation of Section 75.403. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty in accordance with the six criteria set out in Section 110(i) of the Act. *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984). While all of the criteria are not directly applicable to an individual, they can be applied by analogy.

In this case, there is evidence that Gary Wayne Crabtree has not worked in a coal mine for a year. As of the day of the hearing, he was self-employed in the logging and sawmill business and had earned about \$6,800.00 for the year. He has three children to support. Factoring all of this into the six criteria, I conclude that a penalty of \$400.00 is appropriate for

this violation.

**ORDER**

I conclude that Danny Keith Crabtree, in accordance with the settlement agreement, knowingly authorized violations of Sections 75.400 and 75.403 at the J&E Coal Company Mine No. 1 on May 9, 1994. I further conclude that Gary Wayne Crabtree knowingly authorized a violation of Section 75.403, but did not knowingly authorize a violation of Section 75.400. Accordingly, Danny Keith Crabtree is **ORDERED TO PAY** a civil penalty of **\$400.00**, in two monthly installments of \$200.00,<sup>3</sup> and Gary Wayne Crabtree is **ORDERED TO PAY** a civil penalty of **\$400.00**. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon  
Administrative Law Judge

Distribution:

Colleen A. Geraghty, Esq., Office of the Solicitor, U.S.  
Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203  
(Certified Mail)

Gary Wayne Crabtree, Route 1, Box 89-A, Honaker, VA 24260  
(Certified Mail)

Danny Keith Crabtree, Route 1, Box 161, Honaker, VA 24260  
(Certified Mail)

/lsb

---

<sup>3</sup> Evidence received since the hearing from MSHA's Civil Penalty Compliance Office indicates that Danny Keith Crabtree has already made one \$200.00 payment.