FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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July 16, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. LOTHAN DWAYNE SKELTON, employed by SKELTON, INC., Respondent PERRY LEE ROWE, employed by SKELTON, INC., Respondent	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 93-644-M A.C. No. 05-03985-05540 A El-Jay Mine Docket No. WEST 93-645-M A.C. No. 05-03985-05541 A El-Jay Mine

DECISION

Appearances: Kristi L. Floyd, Esq., Dennis J. Tobin, and Barbara J. Renowden, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Ruth E. Gray, Lothan Dwayne Skelton and Perry L. Rowe, Pro Se, for Respondent.

Before: Judge Cetti

These consolidated 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 "Mine Act." Petitioner charges the named Respondents as agents of the corporate mine operator, Skelton, Inc., with knowingly authorizing, ordering or carrying out the violation of five mandatory standards set forth in Part 56 Title 30 Code of Federal Regulations.

Section 110(c) of the Mine Act subjects agents of corporate mine operators to civil penalties if the preponderance of evidence established 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.

In the proceeding against the agent, a violation by the corporate operator must be proved. 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. Section 3(e) of the Act defines an "agent" 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."

The Secretary, in order to establish liability of the agent under 110(c) of the Mine Act, also has the burden of proving by a preponderance of the evidence that the agent "knowingly authorized, ordered or carried out" the violation. The Secretary, however, may sustain his burden of proof on this issue by proving 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.

Thus, 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).

In this case it is clear from the undisputed evidence that Lothan Skelton is the owner, president, and working manager of Skelton, Inc., and that Perry Lee Rowe is the mine foreman. The record shows beyond dispute that both Lothan Skelton and Perry Rowe are agents of the corporation, Skelton, Inc., within the meaning of section 3(e).

Citation No. 3904346 - Handrail for Elevated Walkway

MSHA charges Lothan D. Skelton and Perry L. Rowe with the knowing violation of 30 C.F.R. ' 56.11002. This safety standard in relevant part requires elevated walkways to be of "substantial construction, provided with handrails and maintained in good condition."

The citation reads as follows:

> A section of metal handrailing about 6 feet (approximately 1.8 meters) in length was found not in place on the top walkway around the Telesmith screen deck adjacent the "screen feed conveyor" ... . The walkway was approximately 15 feet (approximately 4.5 meters) above ground level and was used by employees to service the screen and head pulley of the screen feed conveyor. A person falling from this height could easily receive a very serious injury.
>
> Furthermore, adding to the gravity of the hazard, the existing handrailing at the west end of the deck was not being maintained in good condition. The railing was merely tied together at the two corners. One corner was tied with lightweight baling wire and the other with plastic rope, which allowed large openings to exist through which a person could fall.
>
> The crusher was in operation at the Norwood pit, and two employees were observed using the walkway for screen maintenance.
>
> Skelton, Incorporated, has received citations in the past for this same hazardous condition. Most recently was Citation No. 3904956 on 8-28-91. It is obvious that reasonable care was not being taken by the Operator to comply with the safety regulation. This finding results with a high degree of negligence on behalf of management, which constitutes an "unwarrantable failure" to comply.

Inspector Renowden who issued the citation observed Respondent Perry Rowe, the foreman and the crusher operator on the elevated walkway that "surrounds" the Telesmith screen deck. Renowden testified that this elevated screen deck was provided with an inadequate handrail along the perimeter of the walkway. There were missing sections of the handrail which left openings in the railing through which a person could fall. One corner of the handrailing was tied with baling wire and another corner with plastic rope. The handrails were not maintained in good condition.

The inspector designated the violation S&S because, if left uncorrected, he was of the opinion that there was a reasonable likelihood that a person could fall through the opening in the handrailing to the ground or the machinery below. A person falling from the screen deck would sustain serious injury.

On cross-examination, Inspector Renowden, in response to Ms. Gray's assertion the walkway was about 10 feet above the ground, testified that he only estimated the height of the walkway to be 12 to 15 feet above the ground, he did not measure the height.

I credit the testimony of Inspector Renowden. The preponderance of the evidence establishes a knowing violation of the cited safety standard by both of the named Respondents. Both Skelton and the foreman Perry Rowe were aware of the obvious violative condition of the handrail for an extended period of time and failed to correct the violative condition of the handrails. Their conduct was aggravated and constituted more than ordinary negligence. This aggravated conduct subjected both Respondents to liability under section 110(c) of the Act.

Order No. 3904353 - Stacking Conveyor Tail Pulley Guard

This 104(d)(1) order charges an unwarrantable S&S violation of 30 C.F.R. ' 56.14107(a) which requires guarding of tail pulleys. The citation was issued for the alleged failure to adequately guard the tail pulley of a stacking conveyor. The citation reads as follows:

> The metal guard provided on the tail pulley of the "white" stacking conveyor located on the upper mine bench was not acceptable. Sections of the existing guard along each side of the conveyor tail section were missing, thus exposing the dangerous rotating "fluted fins" of the self cleaning pulley and belt pinch points in that vicinity. The ex-

> posed moving machinery was located approximately 2 feet (.54 m) from ground level and was easily accessible to any of the three men working at the crusher. Contact with this hazard could result in at least a disabling injury, if not a fatality.
>
> This hazard and violation was very obvious and should not have been allowed to exist. It was obvious from visual observation that the missing section of guard had been removed with a "cutting torch." The guard when in place would have safely guarded/protected persons from contacting the moving machinery parts. A large adjustable wrench was available hanging off the side of the conveyor which is used to work on the equipment. When discussing this condition with the Operator he stated that the guard was cut off so the belt could be adjusted. When asked why the guard was not put back in place after adjustment the comment was that it was just "a pain and waste of their time messing with them. A person is plain stupid if they stick a hand or arm in there, and they are not stupid!"
>
> The Operator has not used reasonable care on several occasions when it comes to the application of guarding moving machinery. This violation was obvious and known to the Operator and is therefore evaluated as "high negligence" and an "unwarrantable failure" violation.

Inspector Renowden testified to all the material facts set forth in the above quoted citation. I credit his testimony.

I find that Skelton and Rowe were both in a position to know the existence of the inadequate guarding of the tail pulley. It was an obvious violation. The named Respondents knowingly failed to correct the condition. Under the facts and circumstances of this case, this was "aggravated" conduct involving more than merely ordinary negligence. This conduct subjected both named Respondents to liability under 110(c) of the Act.

Order No. 3904360 - Two in Cab of Front Loader

This citation in pertinent part states:

> The crusher foreman and crusher operator were observed riding together in the operator's cab of the KOMATSU WA350 front-end loader. The two men were traveling in the loader from the crushing plant to the upper mine bench to pick up some parts. No provisions were provided in the operator cab to secure safe travel for the second rider. The rider could be injured in the cab or fall out of the cab while traveling, which could be fatal.

Inspector Renowden testified that during his inspection he observed the crusher foreman Rowe get inside the cab of the front-end loader next to the driver of the loader and travel to the upper mine bench. The men were on the way to the upper mine bench to pick up some parts needed to abate a citation issued by Renowden earlier in his inspection. Foreman Rowe stepped into the cab of the front-end loader in full view of the inspectors who were observing him as Rowe was not aware he was doing anything wrong or hazardous. The size of the cab was approximately 4 feet by 5 feet. It is enclosed with a door and windows just like a car. When you open the door there is a 2-foot by 5-foot step to stand on with a handrail all around the step. Respondents presented credible evidence that they were not aware they were doing anything wrong because on a prior inspection, they had observed an MSHA inspector get in the cab of the very same loader, next to the loader operator in the same manner as Rowe and travel back and forth, up and down for more than an hour. Clearly, there was violation of the cited standard and the operator, Respondent Lothan Dwayne Skelton in his corporate persona, Skelton, Inc., accepted by default the violation charged in this identical enforcement document No. 3630301 and accepted the assessed proposed penalty of $3,300.00 for this violation.

As stated earlier this was clearly a violation of the cited standard. However, the violation involved merely ordinary negligence. Unlike other safety standards for which Respondents were cited, Respondents never had any prior citations or discussions with MSHA personnel as to the requirement of the cited standard. Under the facts and circumstances of this case, I do not find that the conduct of Rowe or Skelton in this instance to be "aggravated conduct." Having seen an MSHA inspector during an earlier inspection of the plant travel in the same front-end loader in the same manner Rowe traveled during the instant inspection, Respondent had reason to believe this conduct was permissible safe non-hazardous conduct. Respondents were wrong

in their belief but the Commission has held that to be liable under section 110(c), the corporate agent's conduct must be "aggravated"; 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).

Rowe and Skelton were not only unaware Rowe was violating the provisions of the cited subsection but had a reasonable belief that they were not doing anything that was not permitted in view of their prior observation of an MSHA inspector engaging in identical conduct during a prior inspection. Rowe's conduct involved ordinary negligence and was a violation of the cited standard but Rowe's conduct under the facts of this case was not, in this instance, "aggravated" and, therefore, his conduct was not subject to liability under section 110(c) of the Act.

Citation No. 3630301 - Berms

This order charges the owner-operator Skelton and his foreman Rowe with a knowing violation of 30 C.F.R.' 56.9300(a). Inspector Renowden testified that during his inspection of the mine he observed a lack of berms or guardrails in two areas of the inclined roadway extending from the mine office area to the upper mine bench. Renowden observed a front-end loader with Rowe and the loader operator in the cab traveling on this roadway.

The cited standard ' 56.9300(a) reads as follows:

> (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

Renowden testified that the elevated roadway had drop-offs of sufficient depth and grade that could cause a vehicle to overturn and could result in serious or fatal injuries.

Petitioner presented evidence that in the past on two occasions, March of 1990 and again in October of 1990, the mine had received citations for inadequate berms on elevated roadways at the mine. (Gov't Exs. 11, 12). Respondent presented evidence that these violations were abated by constructing axle high berms on the elevated roadways. Over a period of time, however, the berms had deteriorated due to the weather so that only remnants of the berm remained in some areas. This was a violative condition that should have been corrected by Skelton or Rowe. They observed this violative condition over an extended period of

time. Their failure to correct this violative condition was "aggravated" conduct and thus the violation subjects them to liability under section 110(c) of the Act.

Order No. 3904347 - Head Pulley Guard

This Order alleges a violation of 30 C.F.R. ' 56.14107(a). The citation reads as follows:

> The self-cleaning (fluted) head pulley operating on the under cone crusher conveyor belt was not sufficiently guarded. This condition existed because the existing guard did not extend sufficient distance to cover the exposed pinch points and rotating machinery. The hazardous equipment was located approximately 2 feet from ground level and was accessible to contact by a person.
>
> This unsafe condition was easily noticed and was not taken care of by the Operator. The hazard was very obvious. This Operator has received many citations regarding guards and does not use reasonable care to ensure they are properly installed.

The cited safety standard 30 C.F.R. ' 56.14107(a) provides:

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

Inspector Renowden testified that the self-cleaning pulley referred to in the citation as a head pulley was a reversible pulley. At the time of his inspection it was being used as a tail pulley. The pulley had a guard but the inspector issued the citation because he determined it was inadequate. The guard did not extend a sufficient distance to cover the exposed pinch points. The exposed moving parts were located approximately two feet from the ground and were accessible to human contact.

Perry L. Rowe, the foreman, testified that the guard observed by Inspector Renowden during the instant inspection is the identical guard that another MSHA Inspector had accepted for the

abatement of an earlier citation, issued by Inspector Dennehy, for an inadequate guard on this pulley.

I accept Rowe's testimony that this is the same guard that was installed to abate an earlier violation and that it passed on abatement inspection. However, I do not give this fact much weight as a mitigation factor since I credit the testimony of Inspector Renowden who offered a reasonable explanation for this seeming discrepancy. Inspector Renowden explained:

> A. Another thing that can happen when you're at another pit is if the equipment is set up somewhat different by -- by location, in some instances if the tail or the head's located to where it's not easily accessible to people or it's covered partially by material buildup that never -- never exposes anything, that would be acceptable at that time. But once again, when the plant's relocated and moved and broken down, what might have been good at one place is not good at the other place because of the different layout of the equipment.

I am satisfied from the testimony of Inspector Renowden and the photograph, Government Exhibit 8B, that at the location and setup of the equipment during the instant inspection that the guard was not adequate to cover all exposed pinch points and was, therefore, in violation of the cited standard. The violation was a "knowing" violation within the meaning of section 110(c) because it was obvious and existed over an extended period of time without being corrected by either Skelton or Rowe. This failure to correct the violative condition was aggravated conduct that involved more than merely ordinary negligence and subjects both of the named Respondents to liability under section 110(c) of the Act.

PENALTY

Section 110(c) of the Act provides as follows:

> (c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a 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).

Section 110(i) of the Mine Act provides:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Mr. Skelton incorporated his small mining business in 1973. He testified that no employee has ever had a fatal or permanent disabling injury.

I am mindful the Respondent, Skelton, in his corporate persona, Skelton, Inc., defaulted on each of the five identical citations that are now charged against Skelton as an agent of his incorporated self in this present proceeding and against his foreman Perry Rowe.

These penalties against Skelton, Inc., were incurred when Skelton in his per se representation of his corporate persona, through no one's fault but his own, defaulted on the citations against Skelton, Inc. As a result of that default substantial penalties were assessed for the same identical citations involved in this case.

I have no intention of piercing the corporate veil in this case but it does seem ironic that agents of a partnership of two or more corporations do not have 110(c) liability whereas the

working owners of a very small mining operation consisting of one or two working owners who incorporate their small business are, in addition to being subject to penalties in their corporate persona, are again subject to additional substantial penalties on the same identical citations under section 110(c) as agents of their incorporated self.

In this case, the sole shareholders in the company are Skelton and his secretary Ms. Gray. They are working owners and their only employees are their foreman, Rowe, and one other person.

Ms. Gray credibly testified that in addition to her secretarial duties, she has been operating the crusher since October 1994. Ms. Gray impressed me as an unfeigned, sincere witness. Ms. Gray testified in part as follows:

> [W]e did take some penalties to court in a situation such as this, where we felt we were absolutely right. Guards had been previously approved by Roy Trujillo. And Mr. Renowden and Mr. Dennehy came in, and they didn't like those guards. And so we had to change the guards and were cited again. And when we went to court, the Judge increased the penalty.
>
> And at that point we thought, you know, we wasted two days and to no avail. And when you pull Dwayne (Skelton) and Perry (Rowe) and I away from the business, you've got your three top people. And it's very difficult to run a business without -- as small as we are -- without the top management.
>
> As far as Dwayne's (Skelton) salary is concerned, he was making $2500 a month until December, at which time we bought a piece of equipment. And because Skelton, Incorporated, is -- is overloaded with debt, we put this in his name and gave him a salary increase to $3500 to make the monthly payment on that piece of equipment.
>
> I, myself, have not been drawing a salary since -- an actual paycheck. I think the last one I got was July of '93. And the reason for this is because we got into a couple of situations, you might say, where we

were working out of town and didn't get paid; in '89, and then came back here and worked in Ridgway and didn't get paid again in 1990. In each case it was a hundred thousand dollars, and it really set us back badly. So we still have debts outstanding from those time periods. And it's in order to try to alleviate that debt, I've been forgoing a salary. I felt -- I've been working, but I haven't got paid.

As far as the MSHA payments are concerned, we (Skelton, Inc.) were paying $750 a month total for the previous citations. These were from 1990 up to '92, I believe. Perry (Rowe) just paid off -- Perry's civil penalties have been paid off, and we're (Skelton, Inc.) still paying on Dwayne's (Skelton) civil penalties and the corporate civil penalties and my ex-husband's civil penalties. So the payments are $650 a month total.

MS. GRAY: The new citations that were issued in '92 totaled $28,000. We didn't fight them because of the previous situation. It's very difficult to try to know where you stand.

THE JUDGE: Those are the penalties on the citations that we're hearing about today?

MS. GRAY: That's correct. We (Skelton, Inc.) were fined $3300 for the two people riding in the loader, when you don't even know that's illegal; when the inspector has done that himself, and you assume it's all right.

We (Skelton, Inc.) were fined, I believe, $2200 for that guard, that was an existing guard that had been previously approved that had not been altered in any way since it was approved. The setup is the same.

I mean, as Perry (Rowe) said, that crusher, that under cone crusher -- or under cone conveyor is there. It's part of that plant, and it doesn't move. And they couldn't have made it so short because the dirt was there, because there's a lot of material coming

through that cone and a lot of weight falling on that belt. And when it does, it can't function if it's not clean. A tail pulley has to be clean all the time.

I sent paperwork to the U.S. Attorney -- regarding payment on this $28,000. I haven't heard back from her. I don't know what the payments are going to be set up as.

I don't have any idea how we're going to pay this $15,000. Obviously, we can't put the penalty on Perry (Rowe) because, you know, that's not right. He's working for us. So Skelton, Incorporated, will be responsible. I don't know.

I -- as I said, I run the crusher now. I have for -- since October of '94. And I do my level best to make sure that the guards are in place, to make sure there's a berm on the roadway, to make sure that things are working as they're supposed to be. Just the same as Perry and Dwayne have done. They try to work with MSHA.

Roy's (MSHA Inspector Trujillo) been the one who's been inspecting us lately. And his attitude when he comes into the pit is totally different. He's there to help us. He's there to make sure our employees are safe. And I feel that is the responsibility of an inspector, to come in there and make sure that you're running a safe operation; not to make sure that you get a citation. I believe an inspector's position is to aid and assist.

* * *

But the point is that we have been trying to work with MSHA to the best of our ability. There's -- there are times when we do have to take guards off, but we try to put them back on. And it's just very difficult for an Operator to have someone come in and approve something and then have someone from the same organization come in and say, "That's not right. That's not acceptable."

* * *

I can give you financial statements if you would like.

THE JUDGE: What will the financial statements show?

MS GRAY: The financial statements would show that this company is still carrying a debit in their unappropriated retained earnings, which means that it's a negative amount. We did make profit last year. The company is carrying a credit in their net equity, but the only reason they are is because Dwayne (Skelton) and I have put so much money into this business. We both mortgaged our houses and then subsequently sold those houses and wrote those notes back to the shareholders off into paid-in capital.

* * *

Q. Now, you also said that the company is currently paying Mr. Rowe's and Mr. Skelton's previous penalties?

A. Mr. Skelton's. Mr. Rowe's are paid.

Q. And those were paid by the company?

A. That's correct.

Q. With regard to these assessments, if penalties are assessed against Mr. Rowe and Mr. Skelton for these violations, would the company also pay those penalties?

A. Don't you think they're obligated to?

Q. I would think -- I'm asking you.

A. I'm sure that we would feel obligated to do so, yes.

Inspector Renowden testified that he was not angry when he wrote these unwarrantable failure citations but he was frustra-

ted. His frustration is easy to understand. Fortunately, it appears from Ms. Gray's testimony that Respondents now have a much better cooperative attitude with the MSHA inspector who currently is making the mine's mandatory inspections.

Upon consideration of the applicable statutory criteria I find on balance the following penalties are appropriate against the corporate agents of this very small corporation:

ORDER

Within 40 days of this Decision, Respondent Lothan Dwayne Skelton, in Docket No. WEST 93-644-M **SHALL PAY** to the Secretary of Labor the sum of $3,850.00 as and for the civil penalties shown below:

Citation or Order Number	Penalty
3904346	$1,000.00
3904347	1,000.00
3904353	1,000.00
3630301	850.00
3904360	0

Within 40 days of this Decision, Respondent Perry L. Rowe in Docket No. WEST 93-645-M **SHALL PAY** to the Secretary of Labor the sum of $1,500.00 as and for the civil penalties shown below:

Citation or Order Number	Penalty
3904346	$ 400.00
3904347	400.00
3904353	400.00
3630301	300.00
3904360	0

August F. Cetti
Administrative Law Judge

Distribution:

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