FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 15, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-392
Petitioner	:	A. C. No. 46-06958-03561
v.	:	
	:	Mountaineer Mine
MINGO LOGAN COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
David J. Hardy, Esq., Linden R. Evans, Esq.,

Before: Judge Maurer

STATEMENT OF THE CASE

In this civil penalty proceeding, brought by the Secretary of Labor (Secretary) against the Mingo Logan Coal Company (Mingo Logan) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary charges Mingo Logan with a violation of the training requirements found in Part 48, Title 30, Code of Federal Regulations.

Pursuant to notice, the case was heard in Beckley, West Virginia, on October 20, 1994. At the hearing, Inspector Robert A. Rose testified for the Secretary. Messrs. Matthew Murray and James Mullins testified for Mingo Logan. The parties simultaneously filed briefs on January 17, 1995, which I have duly considered in making the following decision.

STIPULATIONS

At the hearing, the parties entered the following stipulations into the record (Tr. 40-43):

l. Mingo Logan is the operator of the Mountaineer Mine and operations of the Mountaineer Mine are subject to the Mine Safety and Health Act.

2. Robert A. Rose is an authorized representative of the Secretary of Labor.

3. The Administrative Law Judge has jurisdiction to hear this case.

4. True copies of Citation No. 3999455, and the January 8, 1993 modification changing the violation to a section 104(g)(1) order, were served on the respondent.

5. The imposition of the proposed civil penalty will not affect the ability of Mingo Logan to continue in business.

6. The proposed assessment data form (MSHA Form No. 1000-179) contained in Exhibit A attached to the Secretary's Petition, accurately sets forth the size of Mingo Logan in production tons per year, the size of the Mountaineer Mine in production tons per year, the total number of assessed violations for a 24-month period preceding the citation at issue and the total number of inspection days for a 24-month period preceding the date the citation was issued.

7. Timothy Sargent received newly employed experienced miner training when he should have received newly employed inexperienced miner training [new miner training].

FINDINGS, CONCLUSIONS, AND DISCUSSION

Mingo Logan operates a large underground coal mine known as the Mountaineer Mine, located in Mingo County, West Virginia. Beginning in the late summer of 1991, Mingo Logan contracted with Mahon Enterprises (Mahon), an independent contractor registered with MSHA, for the performance of various mining-rated services at the mine. One such contract, dated March 2, 1992, was for the performance of construction work at the mine; more specifically, the installation of an underground 72-inch belt conveyor system. Mahon started the job in late May or early June of 1992, and completed the work in September of 1992.

On August 3, 1992, MSHA Inspector Robert A. Rose, during a regular quarterly inspection of the Mountaineer Mine, issued Section 104(a) Citation No. 3999455 to Mingo Logan for a violation of 30 C.F.R. ' 48.5, after an audit of the training records for Mahon revealed that four employees of Mahon had received newly employed experienced miner training when in fact, according to the records provided at the time, the four employees did not qualify as experienced miners, and therefore, should have received newly employed inexperienced miner training [new miner training]. On January 8, 1993, Inspector Rose modified the

citation to a section 104(g)(1) order, and it was assessed a civil penalty of $5500 for the violation. However, on April 28, 1993, Inspector Rose modified the then (g)(1) order back to the original section 104(a) citation, apparently without effective notice to Mingo Logan, and in any event, the civil penalty was never reassessed after the last modification. Furthermore, at hearing, the Secretary requested that the citation at bar be further modified to delete the names of three of the four employees identified by Inspector Rose as not having received the proper training. This proposed modification was not objected to and is appropriate because, although the records were not available to Inspector Rose at the time of the original issuance of the citation, documentation has been subsequently provided which indicates that the three miners had in fact been properly classified and trained as newly employed experienced miners. Accordingly, the citation was modified to reflect that the only individual who did not receive the proper training was Mahon employee Timothy Sargent.

It is undisputed that Timothy Sargent did not meet the regulatory definition of an experienced miner, and therefore, was improperly trained to the wrong standard. Mahon itself was also cited and has already paid a civil penalty of $1300 for the uncontested (by Mahon) violation.

The Secretary alleges in this case that Mingo Logan, the production-operator, also violated 30 C.F.R. ' 48.5 by failing to ensure that an employee of Mahon, its independent contractor, working at its Mountaineer Mine was properly trained. This in accordance with his "overlapping" compliance theory which is contained in the MSHA Program Policy Manual.[1]

[1]Volume III, Part 45 of MSHA's Program Policy Manual 6

Timothy Sargent was hired by Mahon and given the newly employed experienced miner training required by 30 C.F.R. ' 48.6 on May 27, 1992, based on the now known to be erroneous belief that he was an experienced miner who had just been laid off at a coal mine in Kentucky. Mr. Lenville Mahon had relied on verbal representations made by Sargent and others rather than upon the written application Sargent submitted. For some reason he failed

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(07/01/88 Release III-1) states in pertinent part that:

> This "overlapping" compliance responsibility means that there may be circumstances in which it is appropriate to issue citations or orders to both the independent contractor and to the production-operator for a violation. Enforcement action against a production-operator for a violation(s) involving an independent contractor is normally appropriate in any of the following situations: . . .(3) when the production-operator's miners are exposed to the hazard; . . . . In addition, the production-operator may be required to assure continued compliance with standards and regulations applicable to an independent contractor at the mine.

to review the written application Sargent submitted. It was this same document, that when reviewed by MSHA provided the basis for the instant citation, i.e., that Sargent did not meet the regulatory definition of an experienced miner.

Mingo Logan's major complaint about being cited in this instance is that Mahon was contractually responsible for hiring, training, and supervising its own employees, and it did so. Mingo Logan had no authority to dictate to Mahon who to hire or fire, nor did Mingo Logan have any control over Mahon employees once on the job. In short, Mingo Logan objects to being held liable for a training regulation violation committed entirely by Mahon.

Unfortunately for Mingo Logan, as the operator of the Mountaineer Mine, it is within the wide discretion of MSHA to hold them strictly liable for all violations of the Act which occur on the mine site, whether committed by one of their own employees or an employee of one of their contractors, in the performance of its contractual obligations to the production operator. This includes the discretion to cite both the production-operator and the independent contractor for a violation committed by a contractor's employee. See, e.g., Cathedral Bluffs Shale Oil Co., 6 FMSHRC 1871 (August 1984), rev'd on other grounds, Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir 1986); Consolidation Coal Co., 11 FMSHRC 1439 (August 1989); Bulk Transportation Services, Inc., 13 FMSHRC 1354 (September 1991); and W-P Coal Co., 16 FMSHRC 1407 (July 1994).

In fact, my reading of the Commission's latest pronouncement on this point, the W-P Coal Co. case, cited supra, indicates to me that the Secretary has virtually unbridled discretion to cite whomever he pleases in a multiple operator scenario, including, as here, both operators. The Commission has reserved only a review of the Secretary's enforcement decision for an abuse of discretion, i.e., is it unconscionable, arbitrary or capricious. If not, it is permissible.

The facts of this case demonstrate at least an arguable basis for believing that because of the failure to provide the required training to Sargent, Mingo Logan employees were potentially exposed to the hazards resulting from the violation. This is one of the grounds specifically stated in the Program Policy Manual as justification for enforcement action against a production-operator for a violation actually committed by an independent contractor. And this is in fact the basis upon which Inspector Rose cited Mingo Logan. Mahon employees worked in an

adjoining entry no more than 80 feet from the belt line Sargent was working on and in the same split of air as Mingo Logan

employees. Additionally, they utilized the same buses and haulageways and they traveled in and out of the mine through the same entry. At times, Mingo Logan employees were required to cross under the belt line being constructed by Mahon and their employees were intermingled on this and other occasions underground in the mine. Thusly, in the opinion of the inspector, the inadequately trained Mahon employee potentially exposed Mingo Logan employees to those hazards created by the inadequate training. I cannot find that he abused his discretion in citing Mingo Logan, as well as Mahon for the violation at bar even through the inspector did not have any positive proof that Mr. Sargent actually interacted with any Mingo Logan employees. The assumption was that he did and I do not think it can be absolutely ruled out in the record. At any event, the issue before me is not whether or not Sargent mingled with Mingo Logan employees, but rather, whether Inspector Rose abused his discretion in citing Mingo Logan for the violation. As I have stated before, I cannot find that he did.

Accordingly, I find that Mingo Logan violated 30 C.F.R. ' 48.5, as alleged.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. ' 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U. S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U. S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

A violation of 30 C.F.R. ' 48.5 is found to have occurred. The discrete safety hazard contributed to by the violation is that of a miner being unprepared for the hazards he might encounter underground, as well as the hazard, that he, the untrained miner, might present to others he comes into contact with in the course of his work underground.

What is at issue in this case are the third and fourth elements of the Mathies test.

The Secretary's argument is that because of the difference in the nature and length of the training which should be given to a newly employed inexperienced miner vice a newly employed experienced miner, Mr. Sargent was dangerously short-changed in the training department. The regulations require a minimum of 40 hours of training for inexperienced miners, whereas there is no minimum time requirement for training of experienced miners. Furthermore, the training required for newly employed experienced miners does not include instruction in the subjects of health, cleanup, rockdusting, electrical hazards, first aid or mine gases. And even in the subjects which are covered in both experienced and inexperienced miner training, the training given to an inexperienced miner is generally much more in depth than the training provided to an experienced miner.

In this particular case, the training which Mr. Sargent received did, in fact, cover some of the subjects which are specifically required for inexperienced miner training even though not required for the experienced miner training he was given. However, the Secretary points out that his training only took approximately 4 to 5 hours versus the 40 hours training that he properly should have received. He later received

20 additional hours of training from Mahon to abate the section 104(g)(1) order that was issued to Mahon for this violation.

The Secretary also points out that Mr. Sargent was involved in an accident during his employment with Mahon as further justification for making this citation "S&S". Sargent attempted to lift a moving conveyor belt with his back in order to release a co-worker whose arm had been caught between the belt and a bottom roller. The Secretary argues that had Mr. Sargent received the proper training, he would have been more aware of the hazards associated with underground coal mines, including moving belts and therefore more capable of dealing with an emergency situation rather than reacting as he did, which resulted in multiple lacerations and bruises to himself.

Mingo Logan, on the other hand, argues that a fair reading of the evidence would demonstrate that Sargent's accident resulted from a lack of common sense, rather than any lack of appropriate training. I agree. And so does Inspector Rose for that matter. He testified that he could not "foresee why an individual would do that for any reason. . . . I do not think I would ever try anything like that. I am sure I would not." (Tr. 68-71). Matt Murray, the Safety Technician for Mingo Logan, characterized Sargent's action in putting his body against a running belt as "stupid" (Tr. 144) and stated that additional training would not have prevented this accident.

As to the Secretary's more general theory for making this an "S&S" violation, it is too general. There are no specific facts in the record to show the chance of an injury resulting from this training violation is more than remote or speculative. For example, Inspector Rose, the Secretary's only witness, testified that he did not know anything about what kind of work Sargent performed in the mine, what equipment he used, if any, or even where he was assigned to work. I find therefore, that the inspector's opinion that an injury to someone was "reasonably likely" is purely conclusory and does not satisfy the Secretary's burden of establishing that there was a reasonable likelihood of an injury producing event as a result of this training violation. I thus conclude that the violation herein was not significant and substantial.

The remaining critical issue in this case concerns the negligence of Mingo Logan. The Secretary seeks a finding of "low" negligence with regard to Mingo Logan's failure to monitor more closely the training provided to Mahon's employees.

Mingo Logan's Matt Murray (Safety Technician) acknowledges that Mingo Logan does have a responsibility to ensure that Mahon has complied with the training regulations vis-a-vis Mahon's employees. In fact, Mingo Logan regularly reviewed Mahon's training records for compliance. The disagreement between the parties arises as to whether those reviews were sufficient to ensure compliance. The crux of the matter is that Mingo Logan relied on the training certificate itself to determine

compliance. In this case, the training certificate stated on its face that Tim Sargent had received newly employed experienced miner training. Mingo Logan relied on that fact and did not investigate further. Apparently, the violation was set in motion when Mahon took Sargent's word that he was an experienced miner. Mahon therefore trained him as an experienced miner. Mingo Logan's check of the training records thusly only established that he had been trained and had a proper certificate on file.

The Secretary seems to be saying that you cannot rely on a training certificate, that you must look behind that certificate. Perhaps conduct background investigations on the contractor's employees. It occurs to me that a production-operator, as a separate corporate entity, could very quickly involve itself in privacy-related liability while conducting investigations into the past lives of employees of another corporation.

Both Mahon and its employees retain privacy interests in the medical and other records contained in Mahon's personnel files, since the files contain records not required to be kept under the Act. Murray testified that he refrains from delving into Mahon's personnel files and looks only at the training certificates during his periodic audits, because he has been instructed by his superiors not to invade Mahon's personnel files, because of privacy considerations.

Accordingly, I find that a reasonably prudent production operator could not have anticipated that MSHA would require a production-operator to ensure compliance with the training regulations in this instance by violating the privacy rights of persons employed by its independent contractor.

Moreover, I decline to impute the negligence of Mahon to Mingo Logan under some sort of agency theory because Mahon was separately cited for the identical violation and was assessed a penalty and has paid a substantial civil penalty based on, amongst other criteria, its own negligence, which was in fact causative of this violation. Rather, I have evaluated the negligence factor applicable to Mingo Logan in this case in its own right, and I find, for the above reasons that respondent's

negligence herein was nil. Any reasonably prudent operator in Mingo Logan's position would have reasonably believed that its duty of due care in monitoring Mahon's training program was fulfilled by the periodic audits of the contractor's training certificates and training classes.

Abatement was accomplished entirely by Mahon. Mingo Logan was not involved in abatement.

Taking into account the remaining factors contained in section 110(i) of the Act, as stipulated to by the parties, I conclude that a penalty of $100 is appropriate for the violation cited in Citation No. 3999455.

ORDER

It is **ORDERED** that, within 30 days of this decision, respondent shall pay $100 as a civil penalty for the violation found herein.

Roy J. Maurer
Administrative Law Judge

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