FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 5, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. OLD BEN COAL COMPANY, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 93-442 A. C. No. 46-02052-03693 Mine No. 20
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. DALLAS THURMAN RUNYON, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 95-18 A. C. No. 46-02052-03720 A Mine No. 20
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. JAMES CARLTON DOWNEY, JR., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 95-19 A. C. No. 46-02052-03721 A Mine No. 20
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. JERRY DALE CISCO, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 95-20 A. C. No. 46-02052-03722 A Mine No. 20
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 95-21 A. C. No. 46-02052-03723 A

	:	Mine No. 20
IRVIN CUSTER DEAN,	:	
Respondent	:	

DECISION

Appearances: Javier I. Romanach, Esq., (Pamela S. Silverman, Esq., on brief), Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Timothy M. Biddle, Esq., Thomas A. Stock, Esq., and Lisa A Price, Esq., Crowell & Moring, Washington, D.C., for Respondents.

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 Old Ben Coal Company, Dallas T. Runyon, James C. Downey, Jr., Jerry D. Cisco and Irvin C. Dean 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 the company violated Section 75.202(b) of the Secretary=s Regulations, 30 C.F.R. ' 75.202(b), that Messrs. Runyon, Downey, Cisco and Dean, as agents of the company, knowingly authorized, ordered or carried out the violation, and that Dallas T. Runyon, as an agent of the company, knowingly authorized, ordered or carried out two violations of Section 75.400, 30 C.F.R. ' 75.400. For the reasons set forth below, I find that Old Ben did not violate Section 75.202(b), that, therefore, the named agents did not knowingly authorize, order or carry out the violation, and that Dallas T. Runyon did not knowingly authorize, order or carry out the violations of Section 75.400.

The cases were heard June 21-23, 1995, in Logan, West Virginia. MSHA Coal Mine Inspectors Vicki L. Mullins, Elzie J. Burgess, Jefferson Adkins and Ernie Ross, Jr., MSHA Supervisor William A. Blevins, MSHA Special Investigator James F. Bowman, and miners Garland Mahon, William M. Tate, Bennie Ray White, Robert Stone and George Hager testified for the Secretary. West Virginia State Mine Inspector Lee Sipple, and Old Ben employees James C. Downey, David L. Bailey, James A. Bowers, Jr., Jerry D. Cisco, Irvin C. Dean, Dallas Runyon and Trellis Cisco testified on behalf of the Respondents. The parties also submitted briefs which I have considered in my disposition of this case.[1]

CITATION NO. 3747181

The company is alleged, in Docket No. WEVA 93-442,[2] to have violated Section 75.202(b) because:

> Evidence showed that employees had been working and traveling under unsupported roof in the Beech Creek Belt Entry approximately between the 23 and 24 crosscuts. A fall had occured [*sic*] on 4/14/93 and two certified foreman [*sic*] and a crew of approximately 7 men were sent to clean up the fall. The roof fall area was approximately 9 feet wide to approximately 20 feet in length and the area had been cleared of rock and no additional support was installed. The following tools and supplies were laying [*sic*] under unsupported roof: 2 pieces of pinsteel, 2 pieces of top belt structure, 1 bottom belt roller, 1 air drill were approximately 8 feet outby roof support on the left rib.

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[1] **Counsels for the Respondent submitted a motion for leave to file a reply and a Reply Brief. Since there was no response by the Secretary, I will grant the motion and consider the reply.**

[2] **The remaining citations in this docket were disposed of in a partial decision issued on July 14, 1994. *Old Ben Coal Co.*, 16 FMSHRC 1583 (Judge Hodgdon, July 1994).**

(Govt. Ex. 4.) The four individuals are alleged, in Docket Nos. WEVA 95-18, WEVA 95-19, WEVA 95-20 and WEVA 95-21, to have knowingly authorized, ordered or carried out this violation. [3]

Section 75.202(b) states that A[n]o person shall work or travel under unsupported roof unless in accordance with this subpart.@ With regard to installing temporary roof support, Section 75.210(a), 30 U.S.C. ' 75.210(a), requires A[w]hen installing temporary support, only persons engaged in installing the support shall proceed beyond permanent support.@

The petitions, with respect to the individuals, were 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).

There is no dispute that a roof fall occurred in the mine on April 14, 1993. Thus, the issues of fact under this citation are whether Old Ben employees worked and traveled under unsupported roof and whether Jerry D. Cisco and Irvin C. Dean knowingly authorized, ordered or carried out this violation.

Miner Garland Mahon asserted that the violation did occur and that the two foremen knowingly authorized, ordered and carried out the violation. On the other hand, the two foremen and two other miners who worked at the site, William M. Tate and David L. Bailey, testified that they did not go under unsupported roof except to install temporary roof supports. The two inspectors, who did not conduct their investigation until the next day, believed that the circumstantial evidence they observed supported Mr. Mahon=s assertions, consequently they did not

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[3] **At the start of the trial, counsel for the Secretary moved to dismiss the petitions concerning this violation with respect to James C. Downey, Jr. and Dallas T. Runyon. There being no objection, the motion was granted. (Tr. I. 8.) The dismissals will be indicated in the order at the end of this decision.**

interview any of the other witnesses. Based on the evidence discussed below, I conclude that no violation occurred.

Garland Mahon testified that he was called to the roof fall on the Beech Creek belt. When he arrived, he observed a

> kind of an L shaped fall and it was wide at one end and narrow at the other. It was probably ten or twelve feet across one end and approximately eighteen feet long, twenty feet long, somewhere in that neighborhood. It was probably in the neighborhood of four feet thick because it pulled four-foot bolts out and there was some of those sticking up so it was slightly under four foot.

(Tr. I. 109.)[4] He stated that Jerry Cisco was standing Afive to eight feet@ away from supported roof, *i.e.* under unsupported roof, when he arrived. (Tr. II. 158.)

The miner asserted that he observed other miners working under unsupported roof removing broken rock from the belt and that both Cisco and Irvin Dean were present while this happened. He stated that when he came back from lunch temporary roof supports (jacks) had been set Aon top of the belt and under the brow of the fall on the inby side.@ (Tr. II. 166.) He said that he saw ten to twelve roof bolts sticking out from the fallen rock. Mr. Mahon related that he was on the Aoutby side of the fall,@ Aon the walkway side of the belt,@ under Athe last row of support@ when he observed this. (Tr. I. 110, Tr. II. 165.)

Irvin Dean testified that he observed the clean-up operation on the outby side of the fall and did not travel or work under unsupported roof or see any other miners doing so. He stated

[4] **There is a separate transcript, beginning with page one, for each day of the hearing. Consequently, transcript cites will be to ATr. I,@ ATr. II@ and ATr. III@ as appropriate.**

that he subsequently measured the largest rock in the fall, which fell on the beltline, and it was Aapproximately 28 inches thick, four and a half foot wide, and probably six and a half foot long.@ (Tr. II. 131.) It had Aat least two, maybe three@ roof bolts sticking out of it. (Tr. II. 132.)

Jerry Cisco testified that the only time he or anyone else went under unsupported roof was for Apreparations to get a jack set and set a jack.@ (Tr. II. 110, 112-13.) Concerning the preparations necessary to set a jack, he stated that Athe rock was every which way piled in there. There really was no way you could set a jack on top of that rock to make it safe. So, we cleared out enough to set the jack to try to get the jack set on a solid bottom.@ (*Id.*) He said that three jacks were installed between 11:00 a.m. and 11:20 a.m., Aone on the walk side of the belt, one on top of the belt and one on the off side of the belt.@ (Tr. II. 117, 122.)

William Tate and David Bailey gave testimony which corroborated that given by the foremen. They stated that they did not work under unsupported roof, nor did they see anyone working under unsupported roof. They agreed that three jacks were set during the clean-up. James Bowers testified that two or three jacks were set in the area when he arrived at about 4:30 p.m. on the second shift to make preparations to install roof bolts in the fall area.

It is not necessary to conclude that Garland Mahon gave false testimony to find that no violation occurred in this instance. In fact, it is readily apparent that he still believes that work was performed under unsupported roof in connection with the clean-up of the roof fall. Nevertheless, the other evidence in the case undercuts the accuracy of his observations and indicates that his belief, however well intentioned, is mistaken.

As shown in his diagram of the fall, (Resp. Exs. A and B), he apparently mistook the area of a 1978 roof fall as the area of the one in question. The fall in 1978 covered a much larger area. (Resp. Ex. D.) That he was mistaken as to the size of the area in which the fall occurred is further evidenced by his statement that he saw 10 to 12 roof bolts sticking out of the fallen rock. If these bolts were on four foot centers, as he and the other evidence in the case agree, then the fall would have had to have been much larger than even he indicated. On the other hand, in addition to the testimony discussed above, West Virginia state inspector Lee Sipple testified that the fall was smaller and the Secretary=s witness, William Tate, diagramed it as being significantly smaller that the prior roof fall.

(Resp. Ex. C.)

Consequently, I conclude that the Secretary has not proven that miners worked or traveled under unsupported roof in violation of Section 75.202(b).[5] In reaching this conclusion, I find, despite the testimony of Jefferson Adkins to the contrary, that clearing a space to set up a temporary support comes within the exception to 75.202(b) found in 75.210(a). Mr. Adkins could provide no basis for his statement that this could not be done. Furthermore, it defies common sense to separate preparing a space for a jack from installing a jack and say that a person can go under unsupported roof to do one but not the other. Manifestly, installing temporary roof support includes clearing a place for it, if necessary.

Having found that the Secretary did not prove that miners traveled or worked under unsupported roof in violation of Section 75.202(b), I conclude that Old Ben Coal Company did not violate the regulation. Since there was no violation, it necessarily follows that Jerry Cisco and Irvin Dean did not knowingly authorize, order or carry out a violation.

CITATION NO. 3991478

[5] Although I have not specifically discussed it, I find the inspectors= testimony to have little probative value in view of the fact that they did not observe the scene until the next day, they only observed it from one side, which apparently was not the best side from which to observe it, they did not interview any of the witnesses except Garland Mahon, they did not relate what he told them, and their evidence does not completely square with his testimony, *e.g.*, they only observed one jack while he said there were at least two.

Dallas Runyon, in Docket WEVA 95-18, is charged with knowingly authorizing, ordering or carrying out a violation of Section 75.400[6] of the Secretary=s Regulations on November 19, 1992. The citation alleges:

> The operators clean-up program was not being complied with on the Mate Creek belt flight. Float coal dust, measured to be from 0 to 1/4" in depth, was deposited under the belt, in the entry, and crosscuts, on the belt structure, crib blocks and ventilation devices from the tailpiece to the drive which was scaled to be 1950 feet in length. Wet coal fines and coal dust that measured from 0 to 3 feet in depth was allowed to accumulate under the belt flight at approximate 10 foot intervals for the length of the belt. Loose coal and coal dust had accumulated up to 4 feet in depth at the West Mains discharge area and the belt was running in the accumulations in this area. The float coal dust was black and dry in the majority of the area covered. The belt examination books indicate that this belt flight needed clean and dusted in every examination entry starting 11/1/92 with no corrective action taken to this date.

(Govt. Ex. 8.) The Respondent did not contest whether this violation had occurred. (Tr. II. 172.)

The issue with regard to this citation is whether Dallas Runyon, the mine superintendent, knowingly authorized, ordered or carried out the violation. The evidence presented at the hearing does not establish that he did.

The Secretary=s case is principally based on the *Preshift-Mine Examiner=s Reports* for November 1 through 19, 1992. Almost every entry for the Mate Creek beltline, as well as every other beltline, during that period indicates either that it Aneeds clean@ or Aclean & dust@ or Aneeds clean & dust.@ (Govt. Ex. 9.) In the action taken column, it states Areported,@ with the exception of November 8, 9:00 p.m. to 12:00 p.m., when it does

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[6] **This section provides that A[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.@**

not say anything and November 19, 12:00 a.m. to 7:50 a.m., when it states Abeing corrected.@ (*Id.*) All of the reports are signed by ADallas Runyon@ as superintendent. (*Id.*) From this, the Secretary infers that AMr. Runyan (*sic*) had actual knowledge that violative or hazardous accumulations were reported to exist on the Mate Creek belt flight for fifty consecutive shifts over a period of eighteen days.@ (Sec. Br. at 7.)

The Commission set out the test for determining whether a corporate agent has acted Aknowingly@ 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: AIf 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 Aaggravated,@ *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).

With regard to the examination book entries, Mr. Runyan testified that AI countersigned them saying that these belts were reported to me that they needed some work done. They reported that they needed cleaning and dusting, or whatever.@ (Tr. II. 238.) Concerning the entries themselves, he stated: AIt means it needs additional cleaning and it hasn=t been completely cleaned up.@ (*Id.*) He further testified as follows:

> Q. Does that mean that [there] was no work being done on those belts, in your mind?

A. No, sir.

Q. Why doesn=t that mean that?

A. Because I knew that each shift foreman was working on the belts that he was assigned to, and when he got a belt line completely cleaned, he would put in there, okay. You=ll see some of them says okay. That means it=s been completely cleaned up.

(*Id.*)

Third Shift foreman Trellis Cisco and fire boss Bennie Ray White testified that the entries in the examination book were not intended to indicate that nothing was being done about cleaning up accumulations along the belt line, but only that someplace along the belt there were accumulations to clean up. They also testified, as did Runyon, that a scrapper problem caused accumulations to occur rapidly. They agreed that Mr. Runyon responded to specific reports of accumulation problems and required that cleaning be ongoing.

In a case very similar to this one, the Commission held that a general mine foreman had knowingly authorized a violation of Section 75.400. *Prabhu Deshetty*, 16 FMSHRC 1046 (May 1994). Belt examiners= reports for 12 of the 13 shifts preceding the violation had stated that the No. 1 belt was Adirty@ or Aneeded cleaning@ and Deshetty testified that when he read the reports Ahe understood that a violative or hazardous accumulation was present.@ *Id.* at 1050-51. In addition, the inspector testified that he had discussed the accumulation problem with Deshetty and warned him that the mine needed to look more closely at the problem. *Id.* at 1051. Further, Deshetty testified that he knew of prior accumulation violations because of his review of the mine=s citations. *Id.* Consequently, the Commission found that ADeshetty ignored the specific warnings from MSHA about the large number of accumulation violations at the mine and disregarded the repeated entries in the belt examiners=s reports indicating that the No. 1 belt was in serious need of cleaning@ and, therefore, with actual knowledge of the accumulations, was liable under Section 110(c). *Id.* at 1052.

This case is distinguishable from *Deshetty*. Mr. Runyon did not testify that he knew that violative or hazardous accumulations were present. In fact, from the way the examiners= reports were submitted at this mine there was no way for anyone to determine what specific accumulations were being reported. If

this were done purposely so that supervisors could say that they were not aware of the violations, then a knowing violation may well have existed. *Roy Glenn* at 1587. However, there is no evidence that that was the case. Rather it appears that in November 1992 the mine believed in good faith that the reports were being submitted properly. Accordingly, I conclude that the reports did not provide Mr. Runyon actual knowledge of the violation.[7]

Further, there is no evidence in this case that MSHA had specifically warned the superintendent in particular, or the mine operators, that they had an accumulation problem that needed looking into. Nor did any of the witnesses testify that the mine had a problem with serious accumulations of which Mr. Runyon should have been aware in the normal course of business.

I conclude that Mr. Runyon did not have knowledge of the accumulations in question and that based on the way that examiners= reports were made at that time there was nothing in the reports that would have put him on notice that specific action needed to be taken. Accordingly, I conclude that Dallas Runyon did not knowingly authorize, order or carry out the accumulation violation on November 19, 1992.

[7] **There was testimony that the mine no longer makes its examiners= reports in such a loose fashion, but states specifically where cleanup is needed and what corrective action is being taken. It is to be hoped that this is true, because the mine supervisors should now be on notice that such reporting will not shield them from personal liability in the future.**

CITATION NO. 3994511

This citation was also issued on November 19, 1992, for a violation of Section 75.400. It alleged that:

> Numerous piles of loose coal and coal dust measuring up to 20 feet in length, 10 feet in width and 3 feet in height was [*sic*] being stored at intermittent location [*sic*] in the No. 2 Grapevine Mains entry. The combustible material had been scooped from the No. 3 belt conveyor entry to abate 104B order 3995339, dated Nov. 17, 1992. Also several piles of loose coal, coal dust and float coal dust, measuring up to 20 feet in length, 8 feet in width and 4 feet in height was [*sic*] being stored at spot locations in rooms driven left off Grapevine Mains. The operator has been issued 190 violations in the past 3 years for permitting combustible material to accumulate in active workings and on electrical and mobile equipment.

(Govt. Ex. 13.)

The Secretary=s evidence showed that Inspector Mullins had issued a 104(b) order, 30 U.S.C. ' 814(b), shutting down the No. 3 belt until the accumulations along it had been removed. She had terminated the order in the early morning hours of November 19 after finding that the violation had been abated. Inspector Mullins testified that when she terminated the order she did not check any of the adjacent entries for accumulations. Later that morning, Inspector Blevins discovered the accumulations in question.

George Hager testified that he was the foreman on the Grapevine section. He stated that two scoops and some shoveling were used to abate the 104(b) order. A small scoop was used to clean under the belt and then the accumulations were Ahauled over to the adjacent entry and pushed against the rib to be picked up by the larger scoop and transported to the face.@ (Tr. III. 70-71.) Mr. Hager related that sometime during the process the large scoop broke down and the battery had to be recharged.

During this time, the small scoop was still hauling the accumulations to the adjacent entry, where they remained until the large scoop was back in operation and could begin removing them to the face.

With regard to Dallas Runyon, Mr. Hager testified as follows:

> Q. Who assigned you to clean the belt?
>
> A. Honestly I don=t know if it was Ronald Kennedy or Dallas or maybe both of them together. At times we talked together. Either or both.
>
> Q. Did you all discuss the manner in which to abate Ms. Mullins= 104(b) order?
>
> A. To scoop it with the small scoop, and transport it from there to the face with a larger scoop.
>
> Q. Did you all discuss about dumping any of the material scooped from the belt -- to dump it in the No. 2, in the neutral entry?
>
> A. Yes, to transfer it from one scoop to the other.
>
> . . . .
>
> Q. Did you discuss with Dallas Runyon the best way to clean the belt after Inspector Mullins had issued the 104(b) order?
>
> . . . .
>
> A. I can=t exactly remember the conversation with Dallas or with Bo, but it was determined among us to use the small scoop to scoop under the belt and the large scoop to haul it to the face.
>
> . . . .
>
> Q. Did Dallas Runyon tell you to hide that coal?
>
> A. He did not.
>
> . . . .
>
> Q. Did Dallas Runyon say anything to you regarding the

placement of the material that was scooped from the belt?

A. No, other than discussing about moving from the belt to the No. 2 entry and then hauling from there with the larger scoop to the face.

Q. Did you have any concern that the withdrawal order issued by Inspector Mullins would not be abated if the material was left in the No. 2 entry?

A. No I hadn=t thought about it.

(Tr. III. 67, 69-70, 75, 82-3.)

At the close of the Secretary=s case, the Respondent moved to dismiss this charge against Mr. Runyon for failure to present a *prima facie* case. The Secretary argued that because the company had not used the smaller scoop to haul the accumulations to the face after the large scoop broke down and because Mr. Runyon knew of the method being used to remove the accumulations, he knowingly authorized this violation.

I granted the motion, stating:

> I think a 110(c) requires a knowing violation. It also requires aggravated conduct and I see no evidence of aggravated conduct in the evidence that=s been presented so far. I don=t see any direct evidence that Mr. Runyon even knew about the accumulations in the No. 2 entry. . . . I don=t see any evidence that they weren=t doing what they could to remove the coal.

(Tr. III. 89.)

ORDER

It is **ORDERED** that Citation No. 3747181 in Docket No. WEVA 93-442 is **VACATED** and **DISMISSED** and that the petitions for assessment of civil penalty filed against Dallas T. Runyon, James C. Downey, Jerry D. Cisco and Irvin C. Dean are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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