

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 23, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 96-13  
Petitioner : A.C. No. 46-07465-03505  
v. :  
: Eckman-Page Strip & Auger  
EXTRA ENERGY, INC., :  
Respondent :

DECISION

Appearances: Alan G. Paez, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;  
William C. Miller, II, Esq., Jackson & Kelly, Charleston, West Virginia for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801et seq., the "Act," charging Extra Energy, Incorporated (Extra Energy) with two violations of mandatory standards and proposing civil penalties of \$1,550 for those violations. The general issue before me is whether Extra Energy committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

Background

Extra Energy operates the subject Eckman-Page Strip and Auger Mine in McDowell County, West Virginia. It is a small surface operation employing an average of three to four employees. During the period November, 1994 through April, 1995, the mine routinely operated ten hour shifts, from 7:00 a.m. to 5:00 p.m., Monday through Friday. Independent contractor Neal and Associates, Inc. (Neal) provided security at the mine from 6:00 p.m. to 6:00 a.m. on the weekend nights of Friday, Saturday, and Sunday. Melvin Brian Day, Jr., (Brian) was a security guard employed by Neal in November, 1994 and assigned to provide night security for the mine.

On Sunday morning, April 9, 1995, around 10:00 a.m., when Brian did not return home as usual, his father, Melvin Brian Day, Sr. (Melvin) and his brother, Jeffrey Shawn Day (Shawn) began looking for Brian. Melvin and Shawn drove to the mine site looking along the way for Brian's car. Blocked by the locked gate at the entrance to the mine, they parked and walked onto the property. They found Brian's body in his 1982 Ford Escort with the engine running, the doors locked, the windows rolled up, and his citizens band (CB) radio on. His seat was in a partially reclined position. They gained access to the car by breaking the sunroof.

They attempted to use Brian's CB to call for help but it was inoperable. The CB cable had been severed when they broke into the car. Shawn then took the gate key from Brian's key ring, unlocked the gate and drove to the accident site. Attempts to use the CB in Melvin's car were also unsuccessful so Melvin and Shawn conveyed Brian's body to a nearby town and telephoned for an ambulance. The police were also notified and West Virginia State Trooper Cochran and McDowell County Deputy Sheriff Mitchell responded.

After releasing the body to the ambulance crew, Deputy Mitchell and Trooper Cochran accompanied Melvin and Shawn to the accident site. Mitchell and Cochran examined the car and let it run a few minutes. The officers reportedly commented about smelling fumes and that there was "an exhaust leakage of carbon monoxide". Shawn was then permitted to remove the vehicle from the accident site.

James Altizer, Brian Day's supervisor at Neal, received two telephone calls on April 9, 1995, advising him of Brian's death. The first call was taken by Altizer's wife who reported to him that Brian Day had died in a car accident. A later call informed Altizer that Brian had died on the job site. Driving to the site along with another Neal employee, Timothy Stanley, they found the gate open. They were unable to find anyone on the premises or locate the precise accident site.

Altizer called Extra Energy Superintendent Steve Haynes at around 4:00 or 5:00 p.m. on the evening of the accident to inform him of Brian Day's death. Altizer told Haynes that the victim was found on the job site, that he had died from carbon monoxide poisoning, and that the accident had been investigated by the State Police and the Sheriff's Department. According to Altizer, Haynes responded that "he would take it from there".

Inspector William Uhl of the Department of Labor's Mine Safety and Health Administration (MSHA) was directed to investigate the incident on April 11, 1995. Uhl first contacted the West Virginia Department of Mines and found that two of their inspectors had already been at the mine on April 10. In the course of his investigation Uhl also received a copy of a report of the incident from the McDowell County Sheriff's Department (Government Exhibit No. 2) and the coroner's report (Government Exhibit No. 3). In addition, Uhl inspected the automobile in which Day died. Twelve photographs of the car were admitted into evidence (Government Exhibits 4 through 15).

According to Inspector Uhl, when the motor was operated on this vehicle a separation in the exhaust pipe could be heard as a "fluttering" sound. Carbon monoxide tests were performed with a hand held monitor with the car closed and run for 15 minutes. In each of two tests, 900 parts per million of carbon monoxide was detected. Uhl testified that based on a "chart we had" such an exposure over a three hour period can be fatal. He opined, based upon hearing the exhaust system, that the system had leaks that were "obvious". Uhl also concluded that the violation was serious and "significant and substantial" because exposure to carbon monoxide can be fatal. He concluded however that Extra Energy was chargeable with but little negligence based on his finding that the vehicle was operated by the security contractor only during non-production hours and was therefore rarely seen by this production operator.

Uhl also testified that the fatality had not been reported to MSHA. Uhl spoke to Extra Energy Mine Superintendent Haynes on April 11. Haynes said that he had been called by the security company representative, Altizer, who purportedly told him he did not know whether it occurred on mine property. Haynes maintained that this was his reason for not contacting MSHA. Uhl also determined from the records at the Mt. Hope MSHA office that no report of the incident had been filed. On April 10, MSHA Supervisor Ratcliff was apparently also told by Haynes that he (Haynes) could not ascertain whether a fatality had occurred on mine property. Uhl had understood that Altizer had called Haynes on April 9 and, in fact told him at that time that there had been a fatality "on the job".

James Altizer worked for Neal Associates as a field supervisor in April 1995. He negotiated contracts for Neal and supervised 20 to 30 security guards at various job sites. Altizer recalled that Neal and Associates had contracted with Extra Energy in early 1995 for a security guard. He met with Extra Energy Mine Superintendent Steve Haynes who told Altizer

that he wanted someone to guard the auger. About a week after the contract with Haynes was signed, Altizer hired the deceased and assigned him to the Eckman-Page mine site. Haynes provided Altizer with a key to the mine property and Altizer gave the key to the deceased.

Later, David Hale, another representative of Extra Energy, told Altizer that Day's duties had changed to include some patrolling. The deceased also later told Altizer that he no longer was required to patrol the auger site because of the bad road conditions and he was permitted to locate where he had better "CB" communications, presumably on mine property between the two stockpiles. According to Altizer, the vehicles used by Neal security guards were required to meet state inspection standards and so long as the vehicle met those standards it was allowed on mine property.

Steven Haynes was superintendent for Extra Energy on April 9, 1995, and in November 1994 when they contracted with Neal and Associates for security guards. He recalled telling Altizer that they needed someone to patrol everything at the mine site, including the auger, the two gates and the load-out at the bottom of the hill. According to Haynes, Altizer checked the property and later said that the type of vehicle the guard would be using would prevent him patrolling the auger site. Haynes recalled that he then told Altizer to have the guard check only the gates and the load-out using the county roads. Subsequently Haynes met the deceased twice at the stockpile inside the gate. According to Haynes, Day told him that Altizer wanted him to be stationed there. Haynes purportedly told Day that he did not want him inside the gates. According to Haynes, the second time he found Day at the stockpile he warned him not to be on mine property.

Haynes testified that Altizer called him on April 9 around 6:00 p.m. advising him that a security guard had died but he purportedly was not sure where the guard died. He was further told that the state police were investigating the incident. Haynes maintained that he looked for glass on April 10, but found none and when MSHA Supervisor Ratliff visited around 2:00 p.m. on April 10, Haynes had no answers for him.

Haynes recalls that around 9:00 a.m. on April 10th he told an MSHA employee named "Miller" that he could not find any evidence of the incident on the mine property. Haynes further maintains that the sheriff would not give him any information regarding the incident. Haynes maintains that even as of

April 11, when Inspector Uhl visited the job site he still did not know where the deceased's vehicle was found. Haynes contends that he had no reason to believe it was on mine property.

Haynes admitted that he permitted Day to retain the gate key to mine property for "emergencies" and that Day also needed the gate key presumably to enter mine property in order to chase four-wheelers off the property. Haynes also acknowledged that the gates were probably on mine property and that it was part of Day's responsibilities to ensure that the gates were locked.

### Alleged Violations

Citation No. 3964767 alleges a violation of the standard at 30 C.F.R. § 50.10 and charges as follows:

A fatal accident occurred at this mine on April 9, 1995. The victim was discovered at 10:30 a.m. MSHA was not notified by the operator.

The cited standard provides as follows:

If an accident occurs, an operator shall immediately contact the MSHA district or subdistrict office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA district or subdistrict office, it shall immediately contact the MSHA headquarters office in Arlington, Virginia by telephone, at (800) 746-1553.

Citation No. 3964768, as amended, alleges a violation of the standard at 30 C.F.R. § 77.404(a) and charges as follows:

The 1982 Ford Escort (vin) 2FABPU144CX249029 being operated on this surface mine property was not being maintained in a safe operating condition. The exhaust system was leaking carbon monoxide at three locations and portion of the car body was rusted and deteriorated [sic] allowing high levels of carbon monoxide into the drivers [sic] compartment. High levels of (CO) was [sic] detected when funtional [sic] test were [sic] conducted. This was a contributing factor which resulted in a fatal injury.

The cited standard, 30 C.F.R. § 77.404(a) provides that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Respondent first appears to claim that the deceased, Brian Day, who was admittedly employed as a security guard by independent contractor Neal Associates, was not a "miner" as defined in the Act but was essentially only an unauthorized trespasser on its mine property and for whose actions it therefore assumes no responsibility.<sup>1</sup> Respondent claims the deceased was not a "miner" because "at least during the latter part of his employment by Neal, [he] was specifically directed to stay off mine property when performing his duties" as a security guard on behalf of Respondent.

Regardless of the merits, *vel non*, of Respondent's contention that the Secretary must prove in this case that the deceased was a "miner" under the Act, it is clear from the credible evidence that the deceased was in fact a "miner" as so defined and, furthermore, that he was authorized by Respondent directly and through its contractor, Neal and Associates, to perform services on Respondent's mine property as a security guard. More importantly, the evidence shows that the deceased was, during relevant times, working in the subject mine.

In reaching these conclusions I have not disregarded Haynes' testimony that he had twice directed the deceased to perform his job as a security guard on the county roads outside the mine gates and that he told the deceased that he did not want to see him on mine property. This testimony is, however, contradicted by Altizer's testimony, by the contractor's records which continued to show that the deceased was patrolling on mine property and the fact that an agent of the Respondent reviewed these records, and by Haynes own testimony that the deceased retained an access key for emergency entry onto mine property, to chase trespassers and to secure the gates which were "probably" on mine property. Under the circumstances I accord no weight to Respondent's contention that the deceased was essentially only an unauthorized trespasser.

Respondent next argues that the Secretary's decision to charge it as the production operator in this case was an abuse of discretion. It is now, of course, well established that, in cases involving multiple operators, the Secretary may generally proceed against either an owner or production operator, his contractor, or both. *W-P Coal Company*, 16 FMSHRC 1407 (July 1994); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1360

---

<sup>1</sup> A "miner" is defined in Section 3(g) of the Act as "any individual working in a coal or other mine".

(September 1991); *Consolidation Coal Company*, 11 FMSHRC 1439, 1443 (August 1989). In addition, it is established that the Secretary has wide enforcement discretion. *W-P Coal Company* at 1411. The Commission has nevertheless recognized that review of the Secretary's action in citing an operator is appropriate in order to guard against an abuse of discretion. *Id.* at 1411. The difficulty is that there is little guidance as to what constitutes an abuse of discretion in this regard. The Secretary has here elected to charge both the independent contractor security company, Neal and Associates, and the production operator, Extra Energy, with violations related to the death of the independent contractor's employee Brian Day.

The Secretary argues that his decision to cite Extra Energy as the production operator of the Eckman-Page Mine was based in part by the fact that it was the statutory "operator" who controlled and supervised and had the right and ability to exercise control and supervise the mining operation. The Secretary also argues that the issuing inspector in this case followed MSHA's program policy manual guidelines in determining when to cite production operators. Those guidelines provide as follows:

- (1) When the production operator has contributed by either an act or by an omission to the occurrence of a violation in the course of an independent contractor's work;
- (2) When the production operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor;
- (3) When the production operator's miners are exposed to the hazards; or
- (4) When the production operator has control over the condition that needs abatement. (See Government Exhibit No. 22).

The Secretary's "guidelines" one and two are, however, unworkable and essentially meaningless because it can always be said that a production operator contributed by omission to a violation committed on its premises by one of its contractors. Moreover it would be a rare case indeed where it could not be said that the production operator had some degree of control over a condition at its mine that needed abatement. The fourth "guideline" therefore is also essentially without meaning. Thus, when the Secretary claims that he has followed guidelines one,

two and four it is likewise meaningless. These are not true "guidelines" at all when there are virtually no factual cases which would fall outside of such "guidelines".

The Secretary has also failed to prove that the third "guideline", the only truly workable guideline, was met. Since the deceased was the sole operator of the defective vehicle while acting as a contract security guard at the mine and since he worked at night when the Respondent's workers were ordinarily not present, Respondent's miners were not exposed nor was it likely that they would have been exposed to the carbon monoxide hazard in the cited vehicle presented by the violation charged in Citation No. 3964768. The Secretary offers no explanation as to how his third "guideline" applies to Citation No. 3964767. Under the circumstances I find that the Secretary has failed to demonstrate how his third "guideline" has been met on the facts of this case.

In spite of the noted deficiencies in the Secretary's "guidelines" I nevertheless find that the Secretary did not abuse his discretion in proceeding against both the contractor and the production operator herein. The guidelines are, in any event, merely expressions of general policy and are not binding regulations that the Secretary is required to observe. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (1986). Moreover Respondent did in fact directly contract with Neal for security and tightly and continuously controlled access to mine property with locked gates. The undisputed evidence also clearly shows that the subject vehicle had an obviously defective exhaust system and no current inspection sticker. These factors, while minimal, are sufficient to warrant the Secretary's action in charging Respondent for its part in the violations herein. It is noted that the Secretary has recognized Respondent's lesser responsibility for the violations by his findings of decreased negligence. I further find that with respect to Respondent's failure as production operator to have reported the fatal accident at its operation to MSHA under the standard at 30 C.F.R. § 50.10, there is strict liability regardless of whether Respondent contributed to the accident or had control over the conditions giving rise to the accident.

Respondent also argues that it did not violate the standard at 30 C.F.R. § 50.10 by failing to notify MSHA of the fatal accident, as alleged in Citation No. 3964767, because of Superintendent Haynes' uncertainty that the fatal accident had occurred on its property. While it is undisputed that before Haynes even knew of the incident both the subject vehicle and deceased's body had already been removed from the mine site,



leaving no direct evidence of the accident, I nevertheless find Altizer's testimony credible that on the same day as the accident, he told Haynes that Brian Day had died in his car at the subject mine of carbon monoxide poisoning. In any event since the fatal accident had occurred at the mine and Respondent failed to notify MSHA of the accident, Respondent is strictly liable for the violation. I agree however that ample mitigating circumstances exist to warrant a finding of low negligence and low gravity and that, accordingly, the proposed civil penalty of \$50 is appropriate for this violation considering the criteria under Section 110(i) of the Act.

Neither the existence of the violation charged in Citation No. 3964768 nor the findings associated therewith are otherwise challenged by Respondent (See Respondent's Post Hearing Argument). Based on the record evidence and the Secretary's undisputed findings, including the Secretary's acknowledgment that Respondent's negligence was "rather low" (since the victim worked during non-production hours and was "probably seen very little by the actual controlling operator") I conclude that a civil penalty of \$500 is appropriate.

#### ORDER

Citation Nos. 3964767 and 3964768 are affirmed and Extra Energy, Inc. is hereby directed to pay civil penalties of \$50 and \$500, respectively for the violations charged therein within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge

Distribution:

Alan G. Paez, Esq., Office of the Solicitor, U.S. Dept. of Labor,  
4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified  
Mail)

William C. Miller, II, Esq., Jackson & Kelly, P.O. Box 553,  
Charleston, WV 25322 (Certified Mail)

\jf