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MSHA V. PROPST AND STEMPLE
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 24, 1981

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. MORG 76-28-P

v.

EVERETT PROPST AND ROBERT
STEMPLE

DECISION

In this case, Everett Propst, a preparation plant supervisor, and Robert Stemple, a foreman, are charged with violating section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)("the Coal Act" or "the Act"). For the reasons that follow, we affirm the administrative law judge's decision finding respondents in violation of section 109(c). 1/

On October 2, 1974, an employee of Badger Coal Company was killed when the payloader he was driving rolled backwards down a hill, turned over, and crushed him. 2/ On that day, inspectors from the Mining Enforcement and Safety Administration (MESA) went to the accident site and inspected the payloader. 3/ Shortly after the accident the payloader was moved to an equipment retailer's shop for complete teardown and repair in the presence of the MESA inspectors.

On October 4, 1974, a notice was issued to Badger Coal Company alleging a violation of 30 CFR 77.404(a). 4/ The notice stated:

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1/ The Coal Act was amended by the Federal Mine Safety and Health Amendments Act of 1977. 30 U.S.C. 801 et se . (Supp. III 1979). Section 109(c) of the Coal Act and section 110(c) of the 1977 Mine Act are identical except for the redesignation of other affected sections. Although our analysis would be the same under either Act, this

decision discusses the violations in terms of the statute in effect at the time the alleged violation occurred, the Coal Act.

2/ A payloader or highlift is a large tractor having a hydraulically operated shovel at the front.

3/ Section 301(a) of the 1977 Amendments Act transferred enforcement functions from MESA in the Department of Interior to the Mine Safety and Health Administration in the Department of Labor. 30 U.S.C. 961(a). 4/ 30 CFR 77.404(a) provides:

> Mobile 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.

Badger Coal Company apparently entered into a settlement regarding the notice of violation issued to it and paid a $450 penalty.

> which was being operated in the area of the stock pile on the surface was not being maintained in a safe operating condition. It was evident during an inspection of the above equipment that the following violations existed: The left rear brake shoe linings were covered with oil and dirt. The rivets of the left brake shoe were flush with the brake lining, the brake line was finger loose where it connected to the rear brake tee block, the park brake was not connected to the drive shaft. Sworn testimony by members of the work crew who were present during a fatal accident involving this payloader and by management revealed that the brakes were totally ineffective in stopping the payloader and had been in such condition for approximately 11 days. Management, as well as the operators of the machine were aware of this condition.

On October 2, 1974, during MESA's investigation, witnesses to the accident, as well as Propst and Stemple, the supervisory personnel assigned to the shift, were questioned and their statements taken. MESA again interviewed Propst and Stemple on February 14, 1975, and recorded their statements. Transcripts of both interviews with Propst and Stemple were entered into evidence at the hearing before the administrative law judge.

On September 15, 1975, MESA filed a petition for assessment of civil penalty under section 109(c) of the Coal Act against Propst and Stemple. 5/ Propst and Stemple filed an answer and motion to dismiss arguing, among other things, that section 109(c) of the Coal Act is unconstitutional as applied to them. The administrative law judge denied the motion, stating that he lacked authority "to declare any portion of an Act of Congress invalid." 6/

A hearing was held before the administrative law judge who issued his decision on August 21, 1978. The judge found Propst and Stemple in violation of section 109(c) of the Coal Act because they knew that the payloader was in an unsafe condition and failed to remove it from service as required by 30 CFR 77.404(a). He imposed penalties of $2,000 and $1,500 against Propst and Stemple, respectively. Propst and Stemple filed a petition for discretionary review which was granted by the Commission and oral argument was heard.

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5/ Section 109(c) provides:

> 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 under subsection (a) of this section or section 110(b)(2) of this title, 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 (b) of this section.

6/ The judge granted a continuance pending disposition of a suit by Propst and Stemple in the District Court for the Northern District of West Virginia. The court issued a per curiam decision on December 2, 1976, dismissing the complaint for failure to exhaust administrative remedies. Propst and Stemple v. Kleppe, Civil Action 76-91-E. (D.C.N.D. W. Va., December 2, 1976).

On review Propst and Stemple challenge a number of the judge's factual findings. They argue first that the administrative law judge's finding that the payloader was in an unsafe condition is not supported by substantial evidence. The judge found that at the time of the accident "everyone concerned knew that the highlift had defective brakes, and, that in the event of an engine failure it would be virtually impossible to steer or stop the highlift or slow it down on the grades where it was being operated." The judge explained that the highlift was slowed or stopped "by using the reverse gear or lowering the bucket." The judge concluded that "the brakes were defective, [and] the piece of equipment was unsafe to operate on the terrain at the preparation plant...."

Propst and Stemple's argument that substantial evidence does not support the judge's finding that the payloader was unsafe is premised on a distinction between defective and unsafe equipment. They submit that "[t]he brakes on the payloader unquestionably were defective, but given the totality of the circumstances, the payloader was not so unsafe that it necessarily had to be removed from service."

We reject the attempt here to distinguish between defective and unsafe equipment. Even assuming that there might be some situation in which a defect in equipment would not necessarily render the equipment "unsafe" within the meaning of 30 CFR 77.404(a), we find that the record establishes beyond doubt that the defects in the braking system of the payloader rendered it unsafe under any meaning of that term. The record demonstrates that the brakes were so deficient that the accepted procedure at the mine for stopping or slowing the payloader was to drop the hydraulic shovel or shift into reverse gear. It also establishes that during the teardown of the payloader after the accident, the inspectors found the brakes caked with dirt and mud the shoe linings smooth, the rivets flush with the surface of the shoes, the brake linings finger loose, new cylinders were needed and the hydraulic system controlling the brakes was leaking. Also, the parking brake was rusted and disconnected. The inspectors testified that the entire braking system was ineffective and that none of these conditions were caused by the accident; rather, they existed at the time of the accident. In light of the above, we view the assertion that the payloader was not in an unsafe condition as incredible. Accordingly, we conclude that the judge's finding that the payloader was unsafe to operate is supported by substantial evidence. 30 U.S.C. 823(d)(2).

Propst and Stemple next argue that the judge's finding that they knowingly permitted the payloader to remain in service in an

unsafe condition also is not supported by substantial evidence. Propst and Stemple state that the leak in the brakes' hydraulic system was unknown until after the accident. They assert that "although they each knew 'he brakes were in defective condition, they did no: know the machine was totally without brakes," and that "they thought the brakes worked on one wheel." (Emphasis in brief.) They submit the record reflects that, as supervisors, they had to rely on information provided them by the mechanic, who testified that he had not known about the leak. They assert that parts on order for repair of the brakes were unrelated to the hydraulic system. Accordingly, they argue that they did not knowingly order, authorize or permit an unsafe piece of equipment to remain in service.

Section 109(c) requires that, in order for a corporate agent to be personally liable for a violation of the Act, he must "knowingly authorize, order or carry out such violation." (Emphasis added.) In our decision in Kenny Richardson, No. BARB 78-600-P (January 19, 1981), petition for review filed, No. 81-3060, 6th Cir., Feb. 6, 1981, we held that the term "knowingly" as used in section 109(c) means "knowing or having reason to know", and 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.

Id., slip. op. at 9.

Applying this test, we find that the judge's conclusion that Propst and Stemple knowingly permitted the operation of the unsafe payloader is supported by substantial evidence. Although respondents may not have been aware of the precise nature of all the particular defects in the braking system, the record establishes beyond peradventure that they knew that the problems were so extensive that operators of the payloader were required to resort to dropping the shovel or shifting gears to stop or slow the equipment. Because both Propst and Stemple knew or had reason to know that the payloader was in an unsafe condition and failed to remove it from service immediately, we affirm the judge's finding that they knowingly allowed unsafe equipment to remain in service in violation of the 30 CFR 77.404(a) and section 109(c) of the Act. 7/

Another issue raised by Propst and Stemple concerns their inability to control the company's choice of equipment. The judge found that "the evidence establishes beyond question that this particular highlift with exposed brakes should not have been used in the wet muddy type of operation being conducted st the preparation plant, and that other more suitable equipment was available." Propst and Stemple assert that "the evidence does not demonstrate [they] had control over what type of payloader could be bought", and that "[r]eplacement of a machine with a design defect was beyond their control."

This argument misses the mark. The amount of control Propst and Stemple had over the choice of equipment purchased by their employer is not at issue. Respondents are charged with failing to perform a duty imposed by the standard that was within their authority as supervisors: the repair or removal from service of unsafe equipment.

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7/ Propst and Stemple also argue that the judge erroneously applied a negligence test in determining their liability. The basis for this contention is the judge's reference to the "degree of negligence involved" in determining the amount of the penalty to be assessed for the violation. This argument is rejected. It is clear that the judge did not use a negligence test in determining respondents' liability. Rather, as discussed above, the judge found that Propst and Stemple knowingly allowed unsafe equipment to remain in service. The judge appropriately limited his consideration of negligence to the determination of the penalty. See section 109(a)(1).

Propst and Stemple next argue that they were denied due process because of the failure of MESA investigators to provide full "Miranda type" warnings prior to conducting interviews during the investigation of the fatal accident. Propst and Stemple were interviewed twice by MESA investigators and their statements recorded. The first interview, conducted on the date of the accident, was not preceded by any warnings concerning the giving of statements. Prior to the second interview conducted on February 14, 1975, the following warning was given:

> Now Everett [Propst], before we go on there is a few questions I'd like to ask you in regard to the accident to John McMurdo which resulted in his death on October 2, 1974. Before we start, you ought to know that section 109(b) and (c) does carry criminal penalties and, while I am not formally accusing you of anything (at this time) and I have no authority to arrest or detain you, you should be aware that at some point you could be charged with a crime and you have a right not to answer any or all of my questions. If you do answer, your answers may be used against you in a subsequent court case. You may stop answering these questions at any time you wish. Do you understand what I have just told you? 8/

The transcripts from both interviews were admitted into evidence, over objection, at the hearing.

Propst and Stemple argue that admission of these statements into evidence violated their Fifth Amendment right to due process of law. Their argument is based on Miranda v. Arizona, 384 U.S. 436 (1966). In Miranda, the Supreme Court held that the Fifth Amendment requires that the following warnings be given prior to "custodial interrogation":

> "[t]he person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed."

384 U.S. at 444. In his decision the judge discussed whether full Miranda warnings were required before MESA interviewed Propst and Stemple. He relied on Beckwith v. United States, 425 U.S. 341 (1976), and Oregon v. Mathiason, 429 U.S. 492 (1977), and concluded that warnings were not required because the statements were not made while Propst and Stemple were in custody.

In Beckwith, a taxpayer was interviewed by IRS investigators on two separate occasions. The first interview, in the taxpayer's home, was preceded by Miranda warnings. The second interview, which took place at the taxpayer's office later in the day, was preceded only by a warning

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8/ Essentially the same warning was given to Stemple at the time of his second interview.

~309 that he did not have to furnish any documents. The taxpayer furnished the documents and was subsequently prosecuted for tax fraud. The Supreme Court held that, in these circumstances, the defendant was not in custody during the interview and that Miranda warnings therefore were not required.

In Oregon, the Court held that Miranda warnings were not required until there had been sufficient restriction on a person's freedom to render him in custody. A parolee who voluntarily came to the police station at the request of a police officer confessed to a crime after the officer falsely told him that his fingerprints had been found at the scene of the crime. After the confession, Miranda warnings were given and a complete statement was taped. He was not arrested at the time and was allowed to leave the police station. The Supreme Court noted:

> [T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a half hour interview, respondent did in fact leave the police station without hinderance.

429 U.S. at 495. We agree with the administrative law judge's conclusion that Beckwith and Oregon limit the need to give Miranda warnings "to situations where there is an interrogation subsequent to an actual arrest or where there is a physically coercive method of detainment." The judge further found that no such situation existed in the instant case, that Propst and Stemple's statements were taken under non-custodial, non-coercive circumstances, and, therefore, that Miranda warnings were not required and that the statements made by respondents may properly be used against them."

Propst and Stemple contest the judge's conclusion that their interviews were not taken in custodial or coercive circumstances. They contend that they were required to testify at an inquest initiated by "law enforcement personnel," and that, although they were never arrested, their freedom of action was significantly restrained. In their view, the coercion which concerned the Supreme Court in Miranda is present in this case; they believe that the government's conduct was inherently coercive.

We agree with the judge's conclusion that, despite the fact that Propst and Stemple were subject to extensive questioning, Miranda warnings were not required. We do not believe that the record supports respondents' characterization of the interviews

conducted on the evening of the accident. The record does not reflect that Propst and Stemple were not free to come and go at will. Nor is there evidence that Propst and Stemple were in any way restrained or that their presence and statements during the interview were involuntary. Thus, we affirm the judge's conclusion that the questioning on the evening of the accident was non-custodial and non-coercive in nature. and, consequently. that Miranda warnings were not required.

Propst and Stemple were again interviewed on February 14, 1975. That interview was preceded by the partial warning quoted above. Propst

and Stemple argue that the warning was insufficient because it failed to advise them of their right to counsel. The failure to give full Miranda warnings is not controlling here. The warning given to Propst and Stemple specifically included the statement that the inspector had "no authority to arrest or detain you ... and you have a right not to answer any or all of my questions." Respondents both stated that they understood the warning. In view of the language of the warning, we cannot conclude that the second interviews were either coercive or custodial. 9/

Accordingly, we hold that.Miranda warnings were not required and that Propst and Stemple were not denied due process by the admission of their interview statements into evidence. 10/

Propst and Stemple further argue that the judge erred by admitting into evidence the transcripts of their interviews and relying on them in his decision because "[t]he result of treating such statements as primary evidence is trial and adjudication by statements rather than by hearing...." We find no error in the admission of and reliance on the interview transcripts as primary evidence. The statements were respondents' own and respondents testified at the hearing. Therefore, the use of the statements as primary evidence was entirely proper. McCormick on Evidence, at 629-630 (2d ed. 1972). Cf. Fed. R. Evid. 801(d)(2). 11/

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9/ We note that the administration of Miranda warnings does not convert "a non-custodial interview into a custodial interrogation for Miranda purposes." United States v. Lewis, 556 F.2d 446, 449 (6th Cir. 1977), cert. denied, 434 U.S. 863 (1977).

10/ Based on our finding that the questioning in this case was noncustodial, we find it unnecessary to reach the broader questions of whether the administration of Miranda warnings would ever be required in connection with civil proceedings brought under section 109(c) of the Act, and, if so, what effect the failure to administer such warnings would have on the admissibility of evidence in administrative proceedings before the Commission.

11/ We note that the judge admitted only the transcripts of statements made by Propst and Stemple. The judge excluded the transcripts of statements made by others. We also note that the parties were afforded the opportunity to correct discrepancies between the tapes of the interviews and the transcripts. Counsel for Propst and Stemple did so in a letter to the administrative law judge dated April 28, 1978. In that letter counsel also stated: "If counsel for the

government would be agreeable to correcting the foregoing discrepancies contained in Petitioner's Exhibits 14, 15, 16, 17 ... I would have no continuing objection on the basis of inaccuracy of the exhibits." In a letter dated May 23, 1978, the Secretary agreed with counsel's corrections.

Propst and Stemple further argue that section 109(c) of the 1969 Act violates their constitutional right to equal protection of law "because the statute irrationally and discriminately applies only to agents of corporate coal mines as opposed to agents of partnership mines or sole proprietorships engaged in mining." 12/

In our recent decision in Kenny Richardson, supra, we addressed this argument in depth and concluded that "Congress' imposition of liability on corporate agents is not totally arbitrary but has a rational basis, and therefore ... the classification in section" 109(c) does not offend the Constitution." Id., slip. op. at 21. For the reasons stated in our decision in Richardson. the equal protection challenge to section 109(c) of the Act raised by Propst and Stemple is rejected.

Propst and Stemple also assert that "section 109(c) of the Act is unconstitutional in that it chills the exercise of the First Amendment right to pursue an open, honest and legitimate career by exposing supervisory personnel to substantial personal liability for technical rule violations which may be totally unintentional and beyond the super visor's authority and power to correct. They admit that the statute "does not directly prohibit respondents from pursuing a career as supervisors for a corporate operator", but suggest that it has an impermissible chilling effect on the exercise of that choice.

Even assuming that the right to pursue a particular legitimate career is a constitutionally protected right,.see Meyer v. Nebraska, 262 U.S. 390 (1923), we believe that respondents have failed to establish that section 109(c) impermissibly chills this right. Certainly, it cannot be argued that regulation of occupational or economic pursuits is beyond governmental authority. Statutory and regulatory restrictions affecting a citizen's pursuit of a particular career arc commonplace in our society. See, e.g., United States v. Dotterweich, 320 U.S. 277, 280-281 (1943). Therefore the mere imposition of a statutory duty attendant to the pursuit of a career and the imposition of civil or criminal penalties for the breach of that duty do not, in and of themselves, result in any deprivation of a constitutional right. Furthermore, as discussed in our decision in Richardson, the personal liability imposed on corporate agents by section 109(c) is a rational means of achieving safety and health in our nation's mines. Finally, contrary to respondents' assertion, they have not been penalized for an "unintentional" "technical rule violation" "beyond ... their authority and power to correct." Rather, their liability arises from a knowing violation of a safety standard, compliance with which was within their authority as supervisors.

Accordingly, this challenge to section 109(c) of the Act is also rejected.

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12/ Although there is no equal protection clause in the Fifth Amendment, equal protection is implicitly guaranteed by the Fifth Amendment's due process clause. Weinberger v. Wisenfeld, 420 U.S. 636 (1975).

Propst and Stemple's final argument is that the respective penalties of $2,000 and $1,500 assessed against them are excessive. To support their position they refer to their attempts to improve safety in the "few weeks" they had acted as supervisors, and the fact that their employer paid a penalty of only $450 for the violation charged against it following the fatal accident. The administrative law judge stated that in determining the penalties assessed he considered the financial condition of Propst and Stemple, the seriousness of the violation, and the degree of negligence involved. See section 109(a)(1) of the Act. We find that the judge adequately considered the relevant statutory criteria, that the record supports his findings, and that the penalties assessed against respondents are appropriate. 13/

Accordingly, the decision of the administrative law judge finding respondents in violation of section 109(c) of the Coal Act is affirmed.

Richard V. Backley, Chairman, Concurring in part and Dissenting in part:

For the reasons set forth in my separate opinion in Kenny Richardson, No. BARB 78-600-P (January 19, 1981), I dissent from that part of the opinion that upholds the constitutionality of section 109(c) of the Coal Act.

Richard V. Backley,

Chairman

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13/ The appropriateness of the penalty paid by the corporate operator in settlement of the enforcement proceeding brought against it is not before us.

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