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MSHA V. LJ'S CORP.
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August 26, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. VA 90-47

LJ'S CORPORATION

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION

BY THE COMMISSION:

At issue in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)(the "Mine Act"), is whether LJ's Coal Corporation ("LJ") violated 30 C.F.R. • 49.6(b) because of the alleged failure of its independent contractor, Mine Technology Rescue Station ("MT"), to test mine rescue apparatus at intervals not exceeding 30 days.(Footnote 1) Commission Administrative Law Judge Avram Weisberger concluded that LJ did not violate section 49.6(b). 13 FMSHRC 1491 (September 1991) (ALJ). The Commission granted the Petition of the Secretary of Labor ("Secretary") for Discretionary Review. For the reasons set forth below, we reverse the judge's decision.

1 Section 49.6(b) provides:

Mine rescue apparatus and equipment shall be maintained in a manner that will ensure readiness for immediate use. A person trained in the use and care of breathing apparatus shall inspect and test the apparatus at intervals not exceeding 30 days and shall certify by signature and date that the inspections and tests were done. When the inspection indicates that a corrective action is necessary, the corrective action shall be made and the person shall record the corrective action taken. The certification and the record of corrective action shall be maintained at the mine rescue station for a period of one year and made available on request to an authorized representative of the Secretary.

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I.

Factual Background and Procedural History

LJ's No. 1 Mine, an underground coal mine, is in Lee County, Virginia. LJ contracted with MT to provide it with a mine rescue station and related services. On April 11, 1990, Mine Safety and Health Administration ("MSHA") Inspector Fred Buck examined MT's records of the mine rescue apparatus made available to LJ pursuant to MT's contract with LJ. Buck found that inspection and testing of the mine rescue apparatus had not been done within the 30-day period prescribed under section 49.6(b). On April 16, 1990, Buck issued a citation to LJ pursuant to section 104(a) of the Mine Act, 30 U.S.C.

□ 814(a), alleging a violation of section 49.6(b). The citation states

During an inspection of the Mine Technology Mine

Rescue Station the following violation was

observed[:] The mine rescue apparatus was not being

tested within the 30 day interval. The records

showed the 30 days was exceeded by as much as 4 days.

At the hearing, Inspector Buck testified that, according to MT's records, the required inspection and testing under section 49.6(b) had not been done within 30 days. LJ presented no evidence. In his decision, Judge Weisberger found that, at best, the evidence established that MT's records did not contain an entry listing an inspection of the mine rescue apparatus within the relevant 30-day period. Judge Weisberger concluded that this evidence, by itself, was insufficient to establish that, in fact, the apparatus had not been tested within a 30-day interval. As a result, Judge Weisberger dismissed the citation. 13 FMSHRC at 1492.

II.

Disposition of Issues

On review, the Secretary argues that the judge erred in finding that LJ did not violate section 49.6(b). The Secretary asserts that she established a prima facie case, having shown that MT's records indicated that more than 30 days had elapsed between inspections. The Secretary argues that, after establishing a prima facie case, the operator must provide evidence that the required inspection was actually conducted.

Section 49.6 provides, in pertinent part, that a person trained in the use and care of breathing apparatus shall inspect and test the mine rescue apparatus at intervals not exceeding 30 days and shall certify by signature and date that the inspections and tests were done. The regulation also provides that a record of the certification shall be maintained at the mine rescue station for a period of one year and made available on request to an authorized representative of the Secretary.

The Secretary requires certification of inspections by operators in order to allow MSHA inspectors, upon review of the records, to determine

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whether inspection and testing has been conducted as prescribed in the mandatory safety standard. PDR at 4; S. Br. at 4. If the Secretary were unable to establish a violation by relying on the operator's own records to indicate that the inspection had not been conducted, her only recourse would

be to monitor constantly each operator's inspection and testing activities. The Secretary maintains that such a procedure would be unworkable. PDR at 5. We agree.

Clearly, the purpose of the required recordkeeping is to allow the Secretary, simply by examining the records, to determine whether the operator has conducted the inspection and testing. We agree with the Secretary that the absence of certification of inspection and testing of the mine rescue apparatus, within the 30-day period required by the regulation, is sufficient to establish a prima facie case of a violation. We recognize that the operator may have inspected and tested the mine rescue apparatus, as required, but, for some reason, failed to record such inspection and testing. If such be the case, the operator could come forward with evidence that the inspection and testing were, in fact, performed as required. Since the operator is in the best position to know whether the inspection and testing has been done, we hold that, upon a showing by the Secretary that the operator's records indicate the required certification was not made, the violation is established unless the operator can show that such inspection actually occurred within the relevant time period. Cf. *Southern Ohio Coal Company*, 14 FMSHRC 1, 13 (January 1992); *Mid-Continent Resources*, 11 FMSHRC 505, 509 (April 1989).

Inspector Buck testified that the records required to be kept under section 49.6 indicated that the mine rescue breathing apparatus had not been inspected and tested during the 30-day interval. Tr. 11-12. LJ did not call any witnesses or offer other evidence to show that the required inspection and testing had actually been conducted. See Tr. 24-25. LJ's counsel argued only that there was no evidence that the equipment had not, in fact, been tested. We conclude that the Secretary established a violation. Accordingly, we reverse the judge's finding that LJ did not violate section 49.6(b). The citation indicated that the violation was not of a significant and substantial nature and that it resulted from low negligence. See Tr. 24. Thus, we assess the \$20 civil penalty proposed by the Secretary.

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III.

Conclusion

For the reasons set forth above, we reverse the judge's decision. We conclude that LJ violated section 49.6(b), reinstate the section 104(a) citation, grant the Secretary's petition for civil penalty, and assess a civil penalty of \$20 proposed by the Secretary.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner