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SOL (MSHA) V. RONALD WEAVER  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. WEVA 92-814  
A.C. No. 46-01453-03986-A

v.

Humphrey No. 7 Mine

RONALD WEAVER, EMPLOYED BY  
CONSOLIDATION COAL COMPANY,  
RESPONDENT

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for the Petitioner;  
Clark Frame, Esq., Wilson, Frame and Metheney,  
Morgantown, West Virginia, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalties filed by the Secretary of Labor pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging Ronald Weaver as an agent of a corporate mine operator, Consolidation Coal Company (Consol), with knowingly authorizing, ordering, or carrying out a violation by the named mine operator of the mandatory standard at 30 C.F.R. 75.1001.(FOOTNOTE 1

~1648

Order No. 270847 charges as follows:

Based on information gathered from workers and mgt. it has been determined that on the afternoon shift of May 18, 1990 and midnight shift on May 19, 1990 proper trolley overcurrent protection was not provided for the main haulage between the No. 7 set and the No. 10 set. Approximately block 332 to block 420. A distance of 88 blocks or 8,800 feet. The No. 8 set was out of service due to a shorted power cable. In order to continue hauling coal the ITE breaker at 365 block and the bacon dead block at 405 were jumpered by inserting a knife blade switch handle across the dead blocks. Voltage drop tests indicate a maximum short circuit current value of 1902, 2 amps, 75% setting = 1,427 maximum allowable setting. The No. 7 set borehole breaker was found to be set at 5,000 amps. The No. 10 set breaker was found to be set at 4,000 amps. Therefore short circuit protection was not provided while this condition existed from about 5:00 p.m. May 18 to 1:30 a.m. May 19, 1990. Coal trips were hauled during this time. Orders were given by mine management to set the power up so coal could be hauled. Order No. 2896774 was issued on 5-2-90 for a similar occurrence. A meeting was held on 5-9-90 with mine management to discuss the practice of jumpering dead blocks. Order to be terminated after all persons who work or travel the main haulage are instructed as to the hazards involved when dead blocks are jumpered.

The cited standard provides that "[t]rolley wires and trolley feeder wires shall be provided with overcurrent protection."

Ronald Weaver, Mine Superintendent of the Bowers Portal at the Humphrey No. 7 Mine, does not dispute that he was an agent of the cited corporate mine operator or that a violation of the cited standard did in fact occur as alleged in Order No. 270847. Indeed, at no point in his responsive pleadings has Mr. Weaver denied the Secretary's charges that he "knowingly authorized, ordered, or carried out" the cited violation of the mine operator. In the absence of such a denial the Secretary's allegations may be accepted as true. In any event, the Secretary at hearing produced ample credible evidence to sustain her burden of proving that Mr. Weaver "knowingly authorized" and, in fact, "ordered" the commission of the cited violation.

The Commission defined the term "knowingly," as used in the statutory predecessor to Section 110(c), in *Kenny Richardson v. Secretary of Labor*, 3 FMSHRC 8 (1981), *aff'd* 669 F.2d 632 (6th Cir. 1982), *cert denied*, 461 U.S. 928 (1983) as follows:

"Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. 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. 3 FMSHRC 16.

More recently, the Commission stated that in determining whether the corporate agent knowingly authorized or ordered the violation the Secretary need prove only that he knowingly acted, not that he knowingly violated the law. See *Secretary of Labor v. Warren Steen*, 14 FMSHRC 1125 (1992).

At hearing, Michael Kalich, an experienced coal mine electrical inspector for the Mine Safety and Health Administration, a graduate mining engineer, and a certified electrician, mine foreman and assistant mine foreman, explained the nature of the underlying violation. This highly qualified expert based his testimony upon facts established in the record and upon tests he conducted. He appeared at the Humphrey No. 7 Mine on May 29, 1990, as a result of an anonymous complaint that the trolley wires had been "jumpered" without short circuit protection. It appears that on May 18, 1990, the number eight set power cable had burned through thereby rendering a section of trolley without power. To return power to the trolley to allow continued coal haulage a switch was installed and the Nos. 365 and 405 block breakers were jumpered out thereby tying in other sets. When this occurred short circuit protection could not be provided in this section of trolley wire. According to Kalich, if there was an accident in that area and the trolley wire was broken, it could constitute a serious fire and electric shock hazard.

~1650

Kalich testified that he reenacted these conditions in the No. 10 set by placing a jumper in at the 365 and 405 blocks and performed a voltage drop test. He found only 1700 amps and since the breaker was set at 5,000 amps the breaker could not be triggered. He noted that by jumpering-out, the mine operator could continue to haul coal through the area. The evidence shows that 20 trips of coal were actually hauled during the time the breakers were jumpered-out.

Kalich noted that only eight days before this incident, on May 9, 1990, he conducted a meeting for Humphrey No. 7 mine officials at which the Respondent, Ronald Weaver, was present. A withdrawal order issued on May 2 for a jumpering violation was discussed at this meeting, along with the specific hazards of jumpering out. Kalich testified that in this regard he told the mine officials, including Weaver, that the fingers would have to be removed from the dead blocks throughout the mine to prevent the illegal practice of jumpering. The primary purpose of the meeting, according to Kalich, was to remind mine officials of the dangers of the impermissible practice of jumpering dead blocks and not providing short circuit protection.

Dwight Jeffrey, a maintenance mechanic for Consol since April 1977, generally performed electrical work on the main line during relevant times. He has an "electrical card" from the State of West Virginia and is a member of the United Mine Workers of America. On May 19, 1990, Jeffrey was the main line mechanic on the afternoon (4:00 p.m.- 12 midnight) shift. His foreman at the time was Carroll Tingler. At the beginning of the shift Tingler told Jeffrey that the power was off the number eight set. Jeffrey was able to restart the power but later, about 6:00 or 6:30 p.m., it tripped again. Jeffrey was then unable to reset the power and observed a cable lying at the bottom of the borehole. Apparently the cable had burned through preventing power from reaching the set. Jeffrey testified that he notified management of this problem by way of the dispatcher. At this time he was underground at the number eight set calling on the mine phone to the dispatcher outside.

Foreman Tingler, along with Maintenance Foreman Curtis Mayo, then met underground with Jeffrey. They also talked on a phone line set up through the borehole at the number eight set to the surface with Doug Strausser and Ron Weaver. Strausser was in the management hierarchy superior to Maintenance Foremen Mayo. According to Jeffrey, at one point Ron Weaver was on the phone and ordered Jeffrey to "put a blade in at 365 and have Curt Mayo put one in at the bacon ground." Jeffrey testified that he then inserted the copper blade and jumpered the points. Jeffrey also conveyed Weaver's orders to Mayo to "jumper" at the 450 block and those orders were also carried out. By inserting the blades and jumpering the points the power was returned and coal could be hauled.

~1651

Respondent, Ronald Weaver, testified in his own defense. He is a graduate mining engineer with a masters degree in business administration. During relevant times he was mine superintendent in charge of the Bowers Portal of the Humphrey No. 7 Mine. He recalled the problems regarding borehole number eight on May 18. He told Doug Strausser, the maintenance superintendent, to meet him at the borehole. According to Weaver he relied on Strausser to provide advice on the electrical system and was present with Strausser when he was talking on the mine phone to the men underground. At around 6:30 p.m., according to Weaver, he explained over the phone to Jeffrey to set the power up and at the same time told the dispatcher to reduce the load as necessary. He maintains that he also told Jeffrey that Strausser found the problem and that he (Jeffrey) could go ahead and set up the power the way Strausser told him to do it. According to Weaver he would not know the setup of the breakers and maintains that he did not in fact order Jeffrey to close the switch. He maintains that he did not know what Jeffrey would do and did not know what the settings were that would be appropriate.

On cross-examination Weaver admitted that the dispatcher advised him that 20 trips were taken while the problem existed. Weaver maintains that he relied upon his maintenance people, Mayo and Strausser, regarding electrical matters. According to Weaver, however, Jeffrey made the ultimate decision and Strausser was the one who gave the instructions. He denied knowledge of the mine electrical system claiming that since he was not a certified electrician he only followed the advice of his electricians.

I find the testimony of Michael Kalich and Dwight Jeffrey to be entirely credible and that, accordingly, the Secretary has sustained her burden of proving that Weaver knowingly acted within the meaning of section 110(c). With respect to Jeffrey, no motive has been shown for him to testify other than truthfully. He was a reluctant witness, did not initiate contacts with the Mine Safety and Health Administration and appeared at trial under subpoena. It is highly unlikely, moreover, for a rank and file employee to accuse the highest official of the Bowers Portal, the person having the ultimate authority to hire, fire and discipline, of, in essence, lying. Nor would such a rank and file employee be expected to lightly accuse anyone in such a high position of giving the orders alleged, absent certainty that it was indeed the mine superintendent who directed him on the phone to perform these acts.

I also have difficulty accepting Weaver's testimony. According to the undisputed testimony of Inspector Kalich he warned Humphrey No. 7 Mine officials, including Weaver, only eight days before the instant violation, of the specific dangers

~1652

of jumpering out and of using the knife blades to do so. Indeed, because of this illegal practice in the past, Kalich warned mine officials, including Weaver, to have all of the blades in the mine removed or the mine would be cited. Under these circumstances, where Weaver was himself told of the illegality of the specific practice of jumpering out with the knife blades only a few days before the instant violation, his claims of ignorance regarding mine electrical systems are essentially irrelevant. In any event, while Weaver attempted to deny virtually any knowledge of the mine electrical systems, it is noted that he has had at least one related college level course in obtaining his degree in mining engineering and showed, through detailed testimony, that he indeed does have sufficient knowledge of the mine electrical system to have given the alleged orders to Jeffrey in the May 18 phone call and to have known that those orders could result in violative conditions. (See, e.g., Tr. 129 and 132).

Finally, I note the failure of Respondent to have called a material witness, Doug Strausser, in his defense. Strausser was present with Respondent while the latter was purportedly giving the critical orders over the mine telephone to Jeffrey, and would be expected to corroborate Weaver's testimony if truthful. It is well-established that an adverse inference may be drawn against a party toward whom the missing witness would be favorably disposed or against the party who fails to produce a material witness who is peculiarly available to that party. See U.S. v. Ariz-Ibarra, 651 F.2d 2 (1st Cir.) cert denied, 454, U.S. 895 (1981); U.S. v. Nahoom, 791 F.2d 841 (11th Cir. 1986); 2 Wigmore Evidence 851 (Chadbourn rev. 1979). According to Weaver himself Strausser still worked for him at the subject mine and there is no evidence that he could not have been available to testify. While the adverse inference to be drawn from Respondent's failure to have called Strausser is clearly significant, I find, in any event, that there is ample credible evidence to sustain the Secretary's case, even without this evidence.

Under the circumstances the Secretary has sustained her burden of proving that Respondent Ronald Weaver knowingly authorized and ordered the cited violation. Considering the relevant criteria under Section 110(i) of the Act, I find that the Secretary's proposed penalty of \$1,500 is appropriate.

ORDER

Respondent Ronald Weaver is hereby directed to pay a civil penalty of \$1,500 within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge  
(703) 756-6261

FOOTNOTE START HERE-

1. Section 110(c) provides as follows:

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 issued under subsection (a) or section 105(c), 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).