

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 7, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-146-A
Petitioner	:	A.C. No. 46-01867-03938
v.	:	
	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	
CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 93-81-R
	:	Citation No. 3109525; 11/09/92
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Blacksville No. 1 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	

## DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor,  
U.S. Dept. of Labor, Arlington, Virginia for the  
Secretary of Labor;  
David J. Hardy, Esq., Jackson & Kelly, Charleston,  
West Virginia for the Consolidation Coal Company.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," to challenge Citation No. 3109525 issued by the Secretary of Labor to the Consolidation Coal Company (Consol) on November 9, 1992, for an alleged violation of Section 103(j) of the Act and to challenge the proposed civil penalty of \$50,000. The general issue before me is whether Consol violated Section 103(j) of the Act and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Section 103(j) provides in relevant part that "in the event of any accident occurring in any coal or other mine the operator

shall . . . take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof."

The citation at bar charges as follows:

The mine operator altered evidence which would assist in the accident investigation of the fatal methane explosion that occurred on March 19, 1992 at Consolidation Coal Company's (Consol) Blacksville No. 1 Mine. A Consol vehicle assigned to Rod Baird, Environmental Engineer, was located in the blast area near the Production shaft and was damaged by the explosion. This vehicle contained items related to the work area that would assist the investigation. Specifically, a methane detector and a Consol closable metal clipboard, which Baird reportedly used to attach routine work notes and records, were in the subject vehicle.

On March 21, 1992, Consol employees Walter Scheller and John Morrison entered Baird's vehicle and took Baird's assigned methane detector and clipboard without permission along with a cloth bag of other items. Scheller and Morrison had obtained MSHA's permission to retrieve only training records and Baird's personal effects from the vehicle. Upon being observed and stopped by MSHA accident investigation team member Joseph Vallina, Scheller returned the methane detector to the vehicle. Scheller at the time of this violation was Consolidation Coal Company's Corporate Counsel for MSHA and OSHA affairs. Morrison was the Blacksville No.1 Mine Safety Supervisor.

Upon subsequent written inquiry from MSHA, the operator through counsel represented that the cloth bag contained an empty metal clipboard, along with items of Baird's personal effects.

As clarified at hearing the Secretary is not charging any violation herein with respect to the "metal clipboard", "Baird's personal effects" or the "cloth bag of other items" noted on the face of the citation. The Secretary also made clear at hearing that the location of the noted methane detector within the Baird vehicle was not material to his investigation and that, accordingly, the movement of that methane detector was not, in itself, considered a violation in this case.

Preliminarily I find that the allegations within the four corners of the citation do not state a violation of Section 103(j) of the Act. The citation does not allege that Consol failed to "take appropriate measures to prevent the destruction

of any evidence which would assist in investigating the cause or causes" of the accident at issue. Rather it alleges only that the operator "altered evidence which would assist in the accident investigation". Accordingly the citation must be dismissed for failure to charge a violation of Section 103(j) of the Act.

However, even assuming, *arguendo*, that a violation of Section 103(j) was properly charged, the Secretary has not met his burden of proving that Consol failed to "take appropriate measures to prevent the destruction" of the methane detector at issue in this case. While not specifically germane to the violation charged herein, I note that the Secretary has also not shown in this case that any material evidence was, in fact, ever altered or destroyed. Moreover, even assuming, *arguendo*, that a violation of Section 103(j) was properly charged, the credible evidence shows that the Consol officials charged in the citation conducted their search of the subject vehicle (during which the methane detector was found) only after receiving specific authorization to do so from the Secretary's agent, his chief on-site investigator, and only after being told in effect that the vehicle was no longer within the scope of the Secretary's investigation. Finally, the actions of Consol officials in removing the subject methane detector from the Baird vehicle may reasonably be construed, under all the circumstances, to have been an effort to preserve evidence rather than destroy it.

In this regard, Ronald Wooten, Consol's Vice President for Safety, testified that he, along with company counsel, Walter Scheller, arrived at the Blacksville No. 1 Mine around 8:00 a.m. on March 21, 1992, as part of the continuing investigation of an explosion at the mine on March 19, 1992. A request had been made from the widow of Rodney Baird to recover certain personal effects. Baird, who was killed in the explosion, had been employed as an environmental engineer for Consol. Wooten and Scheller were also continuing to search for certain training records requested by MSHA.

Wooten and Scheller accordingly requested permission from the Secretary's chief on-site investigator, James Rutherford, to enter the company vehicle assigned to Baird to search for these items. According to Wooten, Rutherford responded "that's okay we're through with it" and indicated that he was "done with the vehicle". Based on this authorization to search and remove items from the Baird vehicle and upon Wooten's understanding that they would not otherwise have been permitted to do this, Wooten concluded that the vehicle had already been inventoried by MSHA.

Walter Scheller, then in-house lawyer for Consol, had subsequently been promoted to superintendent at several Consol mines. He was at the Blacksville No.1 Mine site on March 19, 1992, shortly after the explosion and returned on March 21, 1992, between 8:00 and 9:00 a.m., along with Ron Wooten. Informed that certain training records and personal effects of the deceased Rodney Baird were in the subject vehicle, Scheller and Wooten sought permission from Rutherford to search the vehicle and retrieve those items. According to Scheller, Rutherford responded in reference to the requested search "okay we're done with it" -- words to the effect that MSHA had completed its investigation of the vehicle. Scheller also recalls that Rutherford then gave them permission to search the vehicle and presumably retrieve Baird's personal effects and any training records.

Scheller testified that he, along with John Morrison, then proceeded to the Baird vehicle at around 10:00 that morning. There were several MSHA officials and numerous union and Consol officials in the area who they passed en route to the vehicle. It was covered with a blue tarpaulin held by bungee cords. They moved the tarpaulin and Scheller entered the driver's side. He recalled observing a metal clipboard, a small bible, a pop can, keys, a wallet and a methane detector with a charger. Scheller recalled telling Morrison when he found the methane detector to "remember where we found it". Scheller maintains that he was still inside the vehicle when MSHA Inspector Joseph Vallina approached and asked what they were doing. Scheller testified that he told Vallina that Rutherford had given permission to search the vehicle and he had discovered a methane detector. Vallina purportedly told Scheller to return the detector to the vehicle and not to go inside the vehicle again. According to Scheller they then stopped their search, reattached the tarpaulin and returned to the mine office accompanied, at Vallina's direction, by Vallina's colleague, MSHA Inspector Teaster.

Scheller, Morrison and Teaster then returned to the mine office with the cloth bag containing items collected from the car. At the office Rutherford confirmed to Teaster that he had approved of the search. Scheller recalled asking Rutherford whether there was a problem and Rutherford responded "no". Scheller noted that the contents of the bag were emptied on a table in the supervisor's office in plain view of Rutherford and other personnel. He also noted that Inspector Vallina never requested to look in the bag. Scheller further testified that he had planned on giving the methane detector to Rutherford because he thought it could be important to the MSHA investigation. He reaffirmed that he had not destroyed anything taken from the vehicle. He was charged in the instant citation on November 9,

1992, more than seven months after this incident and, according to Scheller, only after MSHA investigators became hostile to Consol.

John Morrison, then safety supervisor at the Blacksville No. 1 Mine, was present when Scheller asked permission from Rutherford to search the Baird vehicle for personal effects and training records. Rutherford consented to this. Morrison recalled that it was around 9:30 or 10:00 in the morning in "broad daylight" when they arrived at the vehicle and MSHA inspector Joe Vallina and two other inspectors were standing in plain view on the bank above them. Scheller opened the driver's side door and found, among other things, Baird's wallet, a bible, a key ring and some wrestling club papers, along with a hand held methanometer. Inspector Vallina then came down to the vehicle and asked what they were doing. Scheller responded that Rutherford had authorized the search to look for personal effects and hazard training records and volunteered "I found this as well" showing Vallina the methanometer. Morrison recalled that Scheller was then standing by the open door of the vehicle and, on Vallina's request, returned the methanometer to where he found it. Upon returning to the mine office, they dumped the contents of the bag of items collected from the Baird vehicle on a table in the superintendent's office. The office door was open.

MSHA Inspector Joseph Vallina corroborates this testimony in essential respects. He and Inspector Teaster were at the time only 25 feet from the Baird vehicle. He first noticed Scheller as he was exiting the vehicle. Scheller told Vallina that Rutherford had given them permission to retrieve training records from the car. When asked if he had anything else, Scheller reportedly responded that he had found a methane detector and asked if he should return it to the car.

Within this framework of corroborated and credible evidence I conclude that, indeed, Scheller had not only been given specific permission by the Secretary's authorized agent to search the Baird vehicle and to remove certain articles but that he was also told that the vehicle, in essence, was no longer within the scope of the Secretary's investigation. I further find credible Scheller's explanation that he intended to hand the methane detector over to the Secretary's chief on-site investigator, James Rutherford, as possible material evidence. Indeed, the most rational explanation under the circumstances is that Scheller intended to protect and preserve evidence rather than destroy it.

If anyone were serious about secreting or destroying such evidence, it is highly unlikely that he would have done so in

broad daylight in plain view of Federal investigators. Moreover, it is unlikely that he would have waited two days after the accident to search for such evidence. If, indeed, there was any intention to secrete or destroy evidence, one would also not expect the perpetrator to first ask permission from the chief Federal investigator to search the vehicle in which the evidence was located. A more likely scenario of a perpetrator with such intent would be a surreptitious night search, without permission and well before investigators had several days opportunity to have searched the vehicle. It may also reasonably be inferred that, at that early stage of the investigation of a possible methane explosion and before the Secretary had charged any violations, the presence of a methane detector in the vehicle of a Consol official could be considered exculpatory. Consol officials would accordingly be motivated to preserve rather than destroy such evidence. Under the circumstances I do not find that the Secretary has met his burden of proving that Consol failed to take "appropriate measures to prevent the destruction" of the methane detector or that, in fact, any material evidence was altered or destroyed.

In reaching these conclusions I have not disregarded the testimony of MSHA investigator Rutherford. He was, indeed, the ranking MSHA investigator on the scene. He was then also in charge of all MSHA engineering departments including accident investigation and had a total of 31 years experience with Federal mining programs. Rutherford recalled that at the time of Scheller's request he was "pretty busy" dealing with many investigative concerns. He recalled, however, that he did, in fact, give Scheller permission to remove training records from the subject vehicle which he, Rutherford, had previously requested from Consol and to retrieve the deceased's wallet and keys for his widow. Rutherford testified that he had no recollection of telling Scheller and Wooten that MSHA was "through with the vehicle". He subsequently denied making such a statement.

However, because Rutherford was admittedly "pretty busy" at the time, dealing with many aspects of the serious multiple fatality investigation he was directing, I conclude that his recollection of the conversation may not have been as clear as could otherwise be expected. Indeed, I note in this regard that Rutherford even omitted from his earlier more contemporaneous notes a significant part of the conversation with Scheller and Wooten which he subsequently recalled. Moreover, I find it highly unlikely that such a skilled and experienced investigator would have permitted Consol employees to search and/or remove anything from a vehicle at the scene of a major investigation

unless he was confident that his investigators had already searched it.

In addition, the testimony of Scheller and Wooten that Rutherford told them MSHA was "through with the vehicle" is certainly consistent with Rutherford's granting permission to search and remove certain articles from that vehicle. This is further corroborated by Morrison, who also testified that Rutherford consented to the search. I also note that Rutherford testified that, on the day before this incident, he had instructed his investigators to inventory all of the vehicles within the affected area. This would suggest that Rutherford may indeed have then believed that the Baird vehicle had already been inventoried. In any event, even Rutherford acknowledges that he consented to the search by Scheller of the Baird vehicle.

Under all the circumstances, I find that there has been no violation of Section 103(j) of the Act and Citation No. 3109525 must accordingly be vacated.<sup>1</sup>

**ORDER**

Citation No. 3109525 is hereby vacated, Contest Proceeding Docket No. WEVA 93-81-R is granted and Civil Penalty Proceeding Docket No. WEVA 93-146-A is dismissed.

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<sup>1</sup> Since it has been found in this case that an authorized agent of the Secretary consented to Scheller's search of the Baird vehicle, there likewise could be no violation of the standard at 30 C.F.R. § 50.12 as suggested in the Secretary's post hearing motion to amend. It is noted that the Secretary had specifically declined, at hearing, to amend the citation to charge a violation of that standard. His subsequent belated motion filed with his post hearing brief to charge "alternatively" a violation of 30 C.F.R. § 50.12 was denied. That motion is accordingly now moot.

Gary Melick  
Administrative Law Judge  
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