

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 2, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 94-247
Petitioner : A.C. No. 46-06958-03578
v. :
 : Mountaineer Mine
MINGO LOGAN COAL COMPANY, :
Respondent :

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Petitioner;
David J. Hardy, Esq., Jackson & Kelly, Charleston,
West Virginia, for Respondent.

Before: Judge Fauver

This civil penalty case involves three citations issued
under ' 104(a) of the Federal Mine Safety and Health Act of 1977,
30 U.S.C. ' 801 et seq.

At the hearing the parties moved for approval of a
settlement of two of the citations. The motion is granted in the
Order below.

The case was heard on Citation No. 3966956.

Having considered the hearing evidence and the record as a
whole, I find that a preponderance of the substantial, reliable
and probative evidence establishes the Findings of Fact and
further findings in the Discussion below:

FINDINGS OF FACT

1. Mingo Logan is the owner and operator of the Mountaineer
Mine, which produces coal for sales in or substantially affecting
interstate commerce.

2. On December 6, 1993, during an inspection of the Mingo Logan Mountaineer Mine, MSHA Inspector Robert A. Rose was accompanied by Matt Murray, the safety coordinator for Mingo Logan. Inspector Rose traveled to the 8 Left section. A contractor of Mingo Logan, Golden Chance Mining, Inc., was responsible for the mining activity in the 8 Left section, which was operated entirely by employees of Golden Chance Mining. Golden Chance was performing advance mining in the conventional pillar and retreat mining cycle, and was extracting coal. Inspector Rose met Kentucky Mine Inspector Eugene White, who was also inspecting the mine. Inspector White was accompanied by Phil Adkins, a safety representative of Mingo Logan. No employee of Golden Chance Mining accompanied either Inspector Rose or Inspector White.

3. Inspector White informed Inspector Rose that he had found smoking materials on a Fletcher roof bolter in the 8 Left section. The smoking materials were 13 cigarettes and one butane lighter. Based on this information, Inspector Rose issued ' 104(a) Citation No. 3966956 to Mingo Logan Coal Company for a violation of 30 C.F.R. ' 75.1702.

4. Section 75.1702 forbids taking smoking materials into an underground coal mine. It also requires the operator to institute a smoking materials search program, approved by the Secretary, "to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters." Mingo Logan's smoking materials search program, approved by MSHA, provides in part: "The search program is systematic and conducted at least weekly on an irregular interval and as often as necessary to ensure the effectiveness of the program." Exhibit G-3.

5. Under its agreement with Mingo Logan, Golden Chance followed Mingo Logan's approved search program to search its own employees. In doing so, it made random searches by having the miners empty their pockets and relying on their honesty in representing that they were not carrying smoking materials into the mine. The search program did not involve patting down the employees.

6. Golden Chance was not issued an identification number by MSHA and was not regarded by MSHA as being subject to the regulation requiring an operator to submit a smoking materials search program for approval by MSHA. MSHA held Mingo Logan responsible for any violations committed by Golden Chance or its employees.

7. Under its contract, Mingo Logan held Golden Chance accountable for any civil penalties Mingo Logan was assessed for violations committed by Golden Chance or its employees. It deducted such civil penalties from its contract payments to Golden Chance.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Liability

Section 75.1702 of the regulations repeats a statutory mandatory safety standard, which provides:

No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosives magazines, or other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters.

The inspector issued Citation No. 3966956 alleging a violation of 30 C.F.R. ' 75.1702 as follows:

The company was not following their approved smoking program in that while writer was on regular inspection he came in contact with state inspector Eugene White that informed me that he had found smoking material, cigarettes (13) and a (1) lighter on the fletcher roof bolting machine on 8 left section 006-0 MMU. He was accommed [sic] by Phil Adkins company Safety. This smoking material was not observed by writer but a citation was issued basic [sic] on the State inspector findings. This is a contractor unit at this mine.

The Secretary contends that, since smoking materials were found underground, Mingo Logan is strictly liable for a violation of ' 75.1702. He reasons that the regulation requires the operator to follow a search program that insures that smoking materials are not taken underground; therefore, finding smoking materials underground "reveals the ineffectiveness of the operator's searches" Reply Brief, p. 10.

Respondent argues that it is not responsible for violations by its independent contractor, Golden Chance, and that, moreover, the contractor was in compliance by making searches in accordance with Mingo Logan's search program approved by the Secretary.

The Act imposes strict liability on mine operators for violations of safety or health standards at the mine regardless of fault and regardless whether the violation was committed by an independent contractor engaged by the mine operator. Western Fuels - Utah, Inc. v. FMSHRC et al, 870 F.2d 711, 716 (D.C. Cir. 1989); Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1359 (1991); Republic Steel Corp., FMSHRC 5, 8-10 (1979).

The first sentence of ' 75.1702 is a strict prohibition:

No person shall . . . carry smoking materials . . .
underground

If smoking materials are found underground, there is a violation of ' 75.1702 and the operator is liable without regard to fault. Thus, it is not relevant in determining an operator's liability whether an independent contractor committed the violation and could also be found liable. A mine operator may not shield itself from liability by contracting with another to carry out part of the mining activity at its mine.

The second sentence of the safety standard is a separate requirement:

The operator shall institute a program, approved by the Secretary, to insure that any person entering the mine does not carry smoking materials, matches, or lighters.

Citation No. 3966956 alleges a violation of ' 75.1702 in a somewhat round-about way:

The company was not following their approved smoking program in that [smoking materials were found underground]. * * *

This amounts to a charge of strict liability for the act of allowing smoking materials to be carried underground. That is, the Secretary is saying that finding smoking materials underground means, per se, that the operator was not following its search program because under ' 75.1702 the program must "insure that any person entering the underground area of the mine does not carry smoking materials" I find this reasoning to be round-about and unnecessary. The violation proved in this case is simply the act of allowing smoking materials to be carried underground. Questions of the adequacy of the search program, how it was carried out, and the reasonableness of the operator's reliance on an independent contractor to make the searches, relate to the factor of negligence in assessing a civil penalty. They are not relevant to the question of the operator's

liability for allowing smoking materials to be carried underground.

The strict liability of ' 75.1702 imposes an obligation on the operator to keep smoking materials out of its mine. It has a duty to submit a search program to the Secretary for approval. However, it may enhance this program in any way it sees fit, e.g., by searching miners every shift, patting them down, using a dog to sniff for tobacco, paying a reward for reporting violations, etc. Such decisions are left up to the operator.

I conclude that the citation, while somewhat awkwardly written, sufficiently charges a violation of the first sentence of ' 75.1702. That issue was adequately and fairly tried at the hearing. Mingo Logan is therefore liable for the violation of ' 75.1702.

Civil Penalty

Section 110(i) of the Act provides six criteria for assessing a civil penalty:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charges, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Mingo Logan is a large operator. In the two-year period before the instant violation, it had 393 violations of mine safety and health standards of which 167 were significant and substantial within the meaning of the Act.

The operator demonstrated good faith in an effort to achieve rapid compliance after the instant citation was issued. Whether it succeeds in maintaining compliance will depend on future events.

The violation was very serious, since the presence of smoking materials in an underground coal mine is highly dangerous.

I find that the violation was due to ordinary negligence. Mingo Logan had at least one prior occurrence of finding smoking materials underground. Its method of executing its approved search program was not thorough. For example, it did not pat down the miners and it relied upon their honesty in representing¹ that they were not carrying smoking materials underground. Since a prior infraction was known by Mingo Logan, there was a duty to increase the effectiveness of its search program (which was used by Golden Chance as an agent).

Considering the criteria for civil penalties in ' 110(i), I find that a civil penalty of \$1,800 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent, Mingo Logan Coal Company, violated 30 C.F.R. ' 75.1702 by allowing smoking materials to be carried into the underground area of its Mountaineer Mine.

ORDER

1. Citation No. 3966956 is AFFIRMED.
2. The motion to approve settlement of Citation Nos. 3973786 and 3973787 for \$100 in penalties is GRANTED.
3. Respondent, Mingo Logan Coal Company, shall pay total civil penalties of \$1,900 within 30 days of this Decision.

¹ A miner's representation could be verbal or by gesture (emptying pockets to represent that no smoking materials are on the miner's person).

William Fauver
Administrative Law Judge

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