CCASE:
SOL (MSHA) V. KENNY RICHARDSON
DDATE:
19790712
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. BARB 78-600-P
v.	Sinclair Mine; Peabody Coal Company Drakesboro, Kentucky
KENNY RICHARDSON, RESPONDENT	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Rees Kinney, Esq., Sam Jarvis, Esq., Jarvis, Payton and Kinney, Greenville, Kentucky, for Respondent

Before: Administrative Law Judge Michels

This matter isbefore me for hearing and decision upon the petition for assessment of civil penalty filed against Kenny Richardson, pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c) (the Act), charging Mr. Richardson with acting as an agent for a corporate operator, Peabody Coal Company, and knowingly authorizing, ordering, or carrying out stated corporate violations of mandatory standards.(FOOTNOTE 1)

The standards allegedly violated are 30 CFR 77.404(a), which requires that machinery and equipment be maintained in a safe operating condition or otherwise removed from service immediately and 30 CFR 77.405(a) which prohibits men from working on or from a piece

of mobile equipment in a raised position until it has been blocked in place securely. The equipment involved was a Model 1260 Bucyrus-Erie dragline which developed a crack in the lower chord or tube of the boom. In the process of repairing the machine, the boom collapsed and a welder fell to his death and others were injured. Following the accident, MSHA conducted an inquiry and thereafter charged the operator with three violations of mandatory standards, the two referred to above and one other not in issue in this proceeding.(FOOTNOTE 2) Peabody did not contest the charges and the penalties assessed were paid for the two violations which have been alleged herein (Petitioner's Exh. No. 39). Thereafter, this action was brought which alleges in effect that Kenny Richardson is individually liable under the Act for the asserted violations of mandatory standards.

The parties are in agreement that these charges involving conditions which occurred under the Federal Coal Mine Health and Safety Act of 1969 were properly brought under the Federal Mine Safety and Health Act of 1977 (Tr. 17-19).

Findings of Fact

The Peabody Coal Company is a Delaware corporation and the operator of the Sinclair Mine which is located near Drakesboro, Kentucky. This mine is a surface strip coal mine which employs approximately 353 men. The daily production of the mine is about 15,000 tons (Petitioner's Exhibit Nos. 2, 3, 39; Tr. 64-67).

Kenny Richardson, whose full name is James Kenneth Richardson, is 45 years old. He lives at 22 Circle Drive, Greenville, Kentucky, and is presently employed by the Peabody Coal Company's Sinclair Mine at Drakesboro, Kentucky. He has been employed at the Sinclair Mine since January 4, 1964. His present position is day shift master mechanic which he has held since June of 1974. The duty of a master mechanic is to be a supervisor of repair work on the stripping equipment (Tr. II, 26-28). Mr. Richardson was the day shift master mechanic in charge of the 1260 dragline on Tuesday, August 2, 1977, and also on the days immediately preceding that date.

A dragline is a type of excavating equipment which casts a rope-hung bucket a considerable distance, collects the dug material by pulling the bucket towards itself on the ground with a second rope, elevates the bucket, and dumps the material on a spoil bank, in a hopper or on a pile (see Dictionary of Mining, Mineral and Related Terms, Department of the Interior, 1968, p. 346). The Bucyrus-Erie 1260 dragline used at the Sinclair Mine is such a machine. It is

pictorially shown in Petitioner's Exhibit Nos. 17-21. The boom or beam of the 1260 dragline is approximately 225 feet long and weighs approximately 200,000 pounds. It is of triangular construction with two 12-inch diameter tubes or "chords" at the top and one single 12-inch diameter chord at the bottom forming a triangle with the V part of the triangle at the bottom. The three chords which form the triangle are each 12 inches in diameter. The walls of the upper chords are 1 inch in thickness, whereas that of the lower chord is one-half inch in thickness. The outside circumference of the lower chord is 38 inches. The three chords are tied together with lacing tubes approximately 6 inches in diameter which form cross-bracing to reinforce the three main chords (Tr. 91-94, 240-241; Tr. II, 112-113, 132).

In its normal working position, the boom is held stationary at a 30-degree angle off the horizontal. The cables of the boom can be dismantled and the boom can be laid on the ground if necessary (Tr. 91-92, 240). The 1260 dragline can be moved by the operator under its own power without assistance from any other machine (Tr. 99).

This machine is equipped with a pressurized system to indicate a crack in the boom. Originally, nitrogen gas was put into the tubes under pressure. Prior to the accident on August 3, 1977, nitrogen was replaced with a compressed air system. There are gauges inside the house of the machine which show the pressure and if a crack develops in a tube the pressure will go down and be visible to the operator of the machine or the oiler (Tr. 233). The pressure in the tube had gone down prior to Monday before the accident, i.e., prior to August 1, 1977, and the pressure system was turned off (Tr. 130-131, 233-234, 264). Edward Yevincy, company-wide master mechanic, had observed that the pressure gauge had gone down indicating a crack in the boom "a week maybe 10 days" before the accident (Tr. II, 187).

In 1968, Bucyrus-Erie recommended that the 1260 dragline be equipped with a "modified intermediate boom suspension system," also called the "change-over kit," a modification designed to support the boom from mast to boom support point. This system was not installed on the Sinclair Mine 1260 dragline and the reason is unknown (Petitioner's Exh. No. 38; Tr. 104). It was installed on the 1260 dragline used at Peabody's River Queen Mine, 6 miles away (Tr. II, 243-244). The 1260 dragline at Peabody's Black Mesa Mine also had the modified system installed (Tr. II, 266).

The modified intermediate boom suspension system would have been acceptable to MSHA in lieu of a block for repairing the boom (Tr. 104, 338). Mr. Richardson denied any knowledge of the suspension system. He testified that in his discussions with Bucyrus-Erie representatives about the cracks on the 1260 dragline he was never advised of the

modified system (Tr. II, 55). However, Wayne Bowling, director of all heavy equipment for Peabody, was aware, prior to the accident, that the 1260 dragline at the Sinclair Mine did not have such system (Tr. II, 247). The modified system was installed on the Sinclair 1260 dragline after the accident (Tr. II, 57-58).

Sometime before August 1, 1977, a crack developed in the lower chord of the boom. The pressure in the tube had dropped a week or 10 days before indicating the crack had developed over a period of time (Tr. II, 187). Mr. Richardson testified he was first advised as to the crack 2 or 3 days before the accident (Tr. II, 231). He was told by Bob Coppage that the crack was getting worse on August 1, 1977, at about 2:30 p.m. (Tr. II, 31, 64). He examined the machine at that time. The crack was visible. He looked at it from the catwalk and could see approximately one-third of the crack or about 10 inches (Tr. II, 65, 66). Mr. Richardson told Bob Coppage that it needed repair (Tr. II, 66).

Mr. Richardson, after completing his inspection, did not consider the machine to be unsafe and he gave instructions that it continue to operate, that is, continue its normal coal digging. The machine continued to operate for about 15 or 20 minutes of Mr. Richardson's shift (Tr. II, 67, 100, 152). The machine was also operated into the second shift for a short period of time (Tr. II, 130). When Mr. Richardson looked at the crack, he could detect "just a little movement" although it was hard to see well (Tr. II, 137). The area of the break was partly obscured by the cross-lacing tubes (Tr. II, 66).

Mr. Yevincy had noticed the crack a week or so prior to the accident and had notified the supervisor, the assistant supervisor, and the master mechanic at the time who was Gail Lee. Mr. Yevincy, on August 2, had also noticed that the crack was "moving a little" (Tr. II, 172).

Cracks had developed at the same point on the chord on the 1260 dragline before. The boom had been repaired a dozen times. On July 19, 1977, there had been a crack repaired by Mr. Yevincy (Tr. II, 124, 172-173; Respondent Exh. No. 1). Mr. Richardson talked with Bucyrus-Erie in July 1977 and was promised instructions for repair. He received certain specifications and instructions on the Saturday prior to the accident. He had also received in June of 1977, information on field repairs (Tr. II, 39-40, 43, 51; Respondent Exh. Nos. 2, 3).

The instructions received by Mr. Richardson from Bucyrus-Erie for field repairs were admitted into the record as Respondent's Exhibit No. 3. The following is the full text of the instructions for effecting repairs on the boom, except for the welding procedures:

FIELD REPAIRS

A. SUPPORTING THE BOOM DURING REPAIRS

In most cases the boom can and should be repaired while it is supported on the machine in its working position. Several methods can be used for access to the area to be repaired.

1. By using an auxiliary crane the welder can be suspended in a basket.

2. Special temporary ladders and platforms can be fabricated. If you require assistance in making these, contact the Service Department at South Milwaukee prior to making the repair.

3. Occasionally the machine to be repaired is in a mine which also has rotary drills. It is possible, depending on the machine location, to position the boom over the mast of the drill so that the repair work can be done from the mast of the drill.

If a section of main chord must be replaced or if numerous cracks are to be repaired, it may be necessary to lower the boom. In this case, the following method of supporting the boom should be followed:

1. As a general rule, use a minimum of four cribs. One under boom point, one under lower apex and one each above and below the chord which is to be removed or repaired. These cribs must be placed at a panel point.

2. When placing cribs, their height should be such that the boom chords are as straight as possible and so that no stress remains in the chord due to its dead weight.

3. Both sides of the boom must be supported even though only one side is to be repaired.

After inspecting the crack on August 2, 1977, Mr. Richardson discussed the method of repair with the second shift master mechanic, Gail Lee, and the day shift machine operator, George Barnett. They considered the possibility of swinging the boom up toward the spoil to make a better work area. There was no discussion of blocking the boom (Tr. II, 68-69, 96-98, 135). Mr. Richardson testified that he did not instruct the second shift mechanics; rather, he stated that he had advised them (Tr. II, 152). He testified further that while

the procedure for repair was discussed, he did not set it up (Tr. II, 99). Mr. Richardson described his participation in the discussion of the repairs as follows:

> A. I told [Gail] that as soon as he got his people over there to shut the machine down, go to work on it, get a good safe working area at the vicinity that he was going to work on the boom, make sure that they had their safety belts and everything in good order, and repair it, put the gussets on, and to talk it over with his crew and see which position that they would rather have the machine in; and I advised him to do that.

(Tr. II, 97).

After observing the crack, Mr. Richardson recognized that immediate repairs were necessary. He told Bob Coppage "that we needed to make some repairs pretty quick" (Tr. II, 66, 201). In response to the question of whether he felt that the machine should be shut down for repairs, Mr. Richardson answered "As soon as I got the available equipment to help over" (Tr. II, 67).

Mr. Richardson was fully familiar with the requirements of the law and the regulations relating to mining and specifically to mandatory standards 30 CFR 77.404(a) and 77.405(a) (Tr. II, 77-80, 162-163).

The repairs, while discussed on the first shift, were actually begun on the third shift which ran from midnight to 8 a.m. Master mechanic Mr. Barber was in charge on this shift (Tr. 150-151). The method used in the past was to take a ladder and secure it to get down to the point of the crack and to use safety belts (Tr. II, 61). The repair on this occasion was approached in the same manner except that a platform for the welder to stand on was attached to the boom (Tr. II, 63). The intended method of repair was to first bevel 6 inches on the side of the lower chord and then to weld the opening solid. After welding the bevel, a gusset plate was to be welded to the chord for reinforcement (Tr. 95-97).

In this instance, the beveling was started approximately 4-1/2 inches above the 9 inches which were still intact of the 38-inch circumference of the chord. Roger Tapp, one of the welders, proceeded to cut the chord and when about 9 inches had been beveled, only 4-1/2 inches of solid wall remained. The lower chord was weakened to the point that it broke. The excess in the load placed on the two upper tubes by the weight of the boom pulling down caused the upper chords to bend upward. As the boom bent upward and back toward the machine, suspension cables running from the mast to the point of the boom went slack allowing the auxiliary support cables to go slack causing the boom to fall to the ground. At the point of

the crack, the boom fell approximately 100 feet to the ground (Tr. 95-97, Petitioner's Exh. Nos. 17-35). The testimony and other evidence indicates that the lower chord, with a circumference of 38 inches, was cracked for approximately all but 9 inches (Tr. 94, 159-161, 217, 250, Petitioner's Exh. Nos. 15-15, 36).

As a result of the accident, the welder, Roger Tapp, fell to the ground and was killed instantly and other miners suffered some injuries (Tr. 85-86; Respondent Exh. No. 6).

During the repair work, the boom of the dragline was not blocked or otherwise secured in place, but was worked on while in its normal raised position for digging operations (Tr. 97, 270, 277). If the machine had been equipped with the modified intermediate boom suspension system, it would not have been necessary to block the boom, according to the testimony of MSHA personnel (Tr. 104, 338). Also, it would not be necessary to block the boom for welding on handrail steps or other work not involving the structure of the boom (Tr. 227-228).

The record fails to reveal the reason why the 1260 dragline at the Sinclair Mine was not equipped with the modified intermediate boom suspension system. The literature which Mr. Richardson received from Bucyrus-Erie does not mention such a system. There is no evidence that the lack of a suspension system on the Sinclair Mine's dragline was a matter of common knowledge at the mine. Only Wayne Bowling testified he was aware that this machine did not have this system (Tr. II, 247). The record does not show that he communicated this information to the Respondent or any other persons at the mine. Mr. Bowling asserts that he did not know whether the boom would have been prevented from falling had it been so equipped (Tr. II, 254).

The 1260 dragline at Sinclair without the modified intermediate boom suspension system was unsafe to operate with a crack in the chord. Inspector James Utley testified that it was unsafe because flexing of the boom through the continued use of the machine would enlarge the crack to the point where the chord would no longer hold. He testified, however, with full knowledge of the ultimate result and also with knowledge that there was no modified suspension system on the machine (Tr. 168). David Whitcomb, a holder of a Bachelor of Science degree in mechanical engineering and an authorized representative of the Secretary, likewise testified that the machine was unsafe with the crack in the chord because the crack would increase and the boom would eventually fall (Tr. 267).

Witnesses for the Respondent and the Respondent himself testified to the effect that the machine in their opinion was safe and that there had been no reason to foresee an accident. This testimony is that of Wayne T. Bowling, director of all heavy equipment (Tr. 235-249, 256-259); Ed Yevincy, company wide master mechanic (Tr.

176-177); George Wallace Barnett, day shift operator for Peabody (Tr. II, 201-202); and Mr. Richardson, the Respondent (Tr. II, 95, 267).

On the question of the safety of the machine, I accept the testimony of the authorized representatives of the Secretary over the Respondent's witnesses because the ultimate breaking of the chord demonstrates that the machine was unsafe. I accordingly find that it was unsafe to continue to operate the machine.

For reasons explained in the discussion, as to the first alleged violation Kenny Richardson knew or should have known that the 1260 dragline was unsafe. As to the second alleged violation, he did not know or have reason to know that the boom of the 1260 dragline should have been blocked while men were working on it with the boom in a raised position.

Discussion

The charge in the petition is that the corporate operator, Peabody Coal Company, violated mandatory safety standards 30 CFR 77.404(a) and 77.405(a) and that Respondent "acting as an agent of the corporate operator within the meaning and scope of section 3(e) of the Act, knowingly authorized, ordered, or carried out each of the aforesaid corporate violations." The petition seeks a penalty of $500 for each of the two alleged violations.

The issues on the merits are (a) whether the corporate operator, Peabody, violated the standards cited, (b) if so, whether Respondent is its agent, and (c) whether Respondent knowingly, authorized, ordered, or carried out these violations. If a violation is found, there is a further issue as to the amount of the penalty to be assessed.(FOOTNOTE 3)

The initial question is whether Peabody Coal Company violated the standards cited. Peabody was not named as a party-respondent in this proceeding and it made no appearance. Prior to the hearing, Peabody, apparently in settlement of charges relating to the alleged violations of 30 CFR 77.404(a) and 77.405(a), paid penalties of respectively $2,050 and $750 as shown on a computer printout (Petitioner's Exh. No. 39; Tr. 360-362).

Respondent in his brief has not raised, at least directly, any issue as to the liability of Peabody, but MSHA lists this is an issue presented. MSHA contends it has shown in this proceeding that Peabody has violated the cited standards and it relies for its position on the decision of the Board of Mine Operations Appeals in Everett L. Pritt, 8 IBMA 216 (1977). MSHA also is apparently attempting to rely on the payment by Peabody of civil penalties as a basis for its position. In its posthearing brief, MSHA states "The corporate operator disposed of its case at the MSHA Assessment Office level, and the assessment imposed by that office is deemed to be the final order of the Commission pursuant to 30 CFR 100.6(c)." As to this latter argument, it is my view that the mere payment of penalties under assessment procedures set up by the Secretary is not an admission of guilt by the operator. MSHA conceded as much on the record by stating that it did not claim that the payment of the civil penalties by Peabody was an admission of liability on its part (Tr. 23-24).

The issue, therefore, is narrowed to whether there is a showing on this record of violations of the cited standards by Peabody. The corporate operator, as noted, was not present at the hearing and it had no opportunity in this proceeding to be heard on the alleged violations. The Board of Mine Operations Appeals held in Everett L. Pritt, supra, that in spite of an operator's absence, the operator could be found liable for the purposes of section 109(c) of the 1969 Act. This section is comparable to section 110(c) of the 1977 Act. Therein the Board stated, overruling the administrative law judge, that the clause "whenever a corporate operator violates a mandatory health or safety standard %y(3)5C" establishes merely a prima facie case under section 109(c) of the 1969 Act. According to the Board, MESA (now MSHA) must establish that the corporate operator violated the standard at issue "but such may be established in a section 109(c) proceeding in the absence of the operator as a party." Board Member Schellenberg dissented, observing that the Board's decision could result in a finding of liability on the part of the agent, though the corporation could be found to be not liable.

The Board cites two other cases decided by administrative law judges in which it asserts that its theory of the law has been followed. However, in those cases the judges made no finding, at least directly, of liability on the part of the corporate operator. In MESA v. Ronald Corl, Docket No. PITT 75-445-P (April 23, 1976), cited by the Board, the judge appears not to have dealt at all with the

issue of corporate operator liability. The second case cited by the Board is MESA v. Daniel Hensler, Docket No. VINC 75-374-P (March 31, 1976). In that case, Judge Luoma found only that "the testimony presented in the instant case within my opinion constitutes a prima facie showing of liability against the operator in a case where the operator is a party." [Emphasis added.]

In my view, the Board was wrong in its decision in the Pritt case. I agree with Board Member Schellenberg in his dissent, not only for the reasons he stated but because there is no way the condition precedent, so clearly set forth in the section, can be met where the corporate operator has not had an opportunity to be heard.(FOOTNOTE 4) Nevertheless, the precedent of the Board appears to be binding unless and until overruled by the Review Commission. The Board decision requires a prima facie showing of liability of the corporate operator as a condition precedent. I will therefore consider the evidence against the corporate operator in terms of the Board's theory as set out in the Pritt case.

There is another matter of a threshold nature and that is whether Mr. Richardson is an agent of the corporate operator, Peabody Coal Company. I find that he is. "Agent" is defined in Section 3(e) of the Act as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." Mr. Richardson is and was a master mechanic on the day shift for the Peabody Coal Company. He was in charge of the 1260 dragline on the first shift and thus fits the definition of an "agent." He had general supervisory authority over the 1260 dragline involved in the alleged violations even though other master mechanics were in charge on the later shift. Thus, I find that Mr. Richardson was an agent for the corporate operator, Peabody Coal Company. See the Hensler case, supra, decided by the Board of Mine Operations Appeals, in which Daniel Hensler, the Respondent, was a section foreman.

Alleged Violation of 30 CFR 77.404(a)

The first allegation against Mr. Richardson concerns the standard 30 CFR 77.404(a) which 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."

The charge as set out in the notice of violation dated August 4, 1977 (Petitioner's Exh. No. 4), is as follows: "Mobile equipment in unsafe condition was not removed from service immediately, in that, a crack in the lower chord of the boom of the Bucyrus-Erie 1260 dragline was known to exist and not removed from service."

The evidence received in this proceeding is sufficient in my view to establish a prima facie case against Peabody Coal Company. The equipment, the 1260 Bucyrus-Erie dragline, had not been fitted with the modified intermediate boom suspension system and therefore was vulnerable to a collapse of the boom such as that which occurred on August 3, 1977. Under the circumstances, cracks in the chords of the boom made it highly unsafe. Two witnesses for the Petitioner, both authorized representatives of the Secretary, testified that the boom was unsafe. Their testimony, it appears, was based on their knowledge that the machine was not equipped with the modified intermediate boom suspension system (Tr. 168, 273). Both witnesses testified to the effect that the boom flexes and that each time a load is picked up and then dropped there would be a flexing which would tend to widen the crack until eventually the chord would be severed. Correspondence from Bucyrus-Erie (a letter to Mr. William Craft, dated September 22, 1977, Petitioner's Exh. No. 38), leaves no doubt that the machine in its condition was unsafe. The letter states: "[t]he crack should have been repaired immediately when it was detected."

Other testimony which will be reviewed in more detail below is to the effect that the equipment was not unsafe at the time on August 2, 1977, that Mr. Richardson was in charge. Mr. Richardson claimed in his testimony that the machine was safe and that it was the cutting into the new metal that made it unsafe. Other witnesses asserted that the machine was safe in their opinion, even though the lower chord had a crack in it of two-thirds its diameter. These witnesses were Wayne T. Bowling, director of all heavy equipment for Peabody, Ed Yevincy, oiler and machine operator for Peabody, and George Wallace Barnett, also an operator of the 1260 dragline for Peabody. Mr. Bowling knew that the 1260 dragline at Sinclair was not equipped with the modified suspension system although he claimed he did not know whether the system would have prevented the boom from falling. As to these latter witnesses, I construe their testimony to mean that, based on the condition as they understood it at the time, they did not believe it to be unsafe. The fact as now known that the broken chord was on a machine not equipped with the modified

intermediate boom suspension system and that it was vulnerable to collapse leaves no basis for their contentions that it was safe. The crack was extending further because of the flexing of the boom and it was only a matter of time until the chord would break and the boom would fall, subjecting miners in the area to the hazard.

Accordingly, I find that the machine was unsafe to operate and pursuant to 30 CFR 77.404(a) should have been removed from service immediately. It was not removed, however, but continued to operate even after personnel had become aware that the crack was enlarging. Therefore, the evidence establishes a prima facie case against the corporate operator, Peabody Coal Company, for a violation of mandatory standard 30 CFR 77.404(a).

The Respondent is an individual and is charged under section 110(c) of the Act as an agent of Peabody Coal Company "who knowingly authorized, ordered, or carried out such violation." Mr. Richardson testified that he had specifically instructed the miners to continue to operate the machine for the remainder of the day shift, a period of 15 to 20 minutes (Tr. II, 152). Thus, he authorized or ordered such violation and the only issue remaining is whether he did so "knowingly." Mr. Richardson admitted during his testimony that he was familiar with the two mandatory standards charged in this proceeding.

The word "knowingly," as used in civil and criminal statutes, is not a term of precise definition. The courts have given various shades of meaning to the word, depending upon the context in which it was considered. See 51 C.J.S. Knowingly (1969), and cases cited thereunder. There is no legislative history under either section 109(c) of the 1969 Act or section 110(c) of the 1977 Act which provides guidance in construing the meaning of this term. Moreover, neither the Board of Mine Operations Appeals nor the Commission has interpreted the meaning of the word "knowingly" in section 109(c) of the 1969 Act. The Commission has not yet construed the meaning of the word in the 1977 Act.

Respondent urges the test applied by Administrative Law Judge Schweitzer in MSHA v. Harvel, Docket No. DENV 77-40-P (November 16, 1978), in which he states as follows:

> "Knowingly," for the purpose of its application to this case regarding section 109(c), means done "intentionally" or "consciously," with knowledge of the facts. It requires more than that the act was done by way of oversight or inadvertence or was an accident, but it does not require that the act was willful, involving reckless disregard of the law.

MSHA argues that the word should have the same meaning as that under contract law, that is, knowing or having reason to know.

The only court case treating the question appears to be United States v. Consolidation Coal Company and Donald Kidd, 504 F.2d 1330, 1335 (6th Cir. 1974). There, the court in construing a criminal provision of the Act stated to the effect that "willfully" means something more than "knowingly" and that even "willfully" need not connote bad purpose, either to disobey or disregard the law or an evil motive.

In support of its position that "knowingly" means knowing or having reason to know, MSHA cites two other cases decided by administrative law judges which bear on this question, namely, Secretary of Labor v. Cowin and Company, Inc., Docket Nos. HOPE 76-210-P through HOPE 76-213-P (Judge Broderick, September 14, 1978), and MSHA v. A. W. Garrett et al., Docket Nos. NORT 76X400-P, etc. (Judge Steffey, June 30, 1977), as well as the United States District Court case, United States v. Sweetbriar, 92 F. Supp. 777, 780 (D.C.W.D.S.C. 1950).

In the Sweetbriar case, the court held:

> [T]he term "knowingly" as used in the Act [the Walsh-Healey Public Contracts 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.

92 F. Supp. 777 at 780.

In my view, the meaning given to the term "knowingly" by the court in Sweetbriar, even though the court was considering a wholly different statute, is one which should be applied to the same term in section 110(c) of the Mine Act. If a showing of actual knowledge that the condition was unsafe was required, it would be applying an extremely strict standard to this civil statute. This does not appear to be the intent of Congress. Accordingly, I will construe the term to mean knowing or having reason to know. Such construction would be in accordance with the Congressional purpose to foster safety in the work place.

Applying such a standard, Mr. Richardson, as to the first alleged violation, i.e., not removing unsafe equipment from service immediately, either knew or had reason to know that the equipment was unsafe under the Sweetbriar reasoning; i.e., he knew or had reason to know when he had such information as would leave a person exercising reasonable care to acquire knowledge of the facts in question or to infer its existence. My reasoning will be developed in the paragraphs which follow.

Preliminarily, it should be considered that the 1260 dragline at the Sinclair Mine was not equipped with the modified intermediate boom suspension system. Had the machine been so equipped, there would not have been violations of either standard as alleged. MSHA officials concede that had the machine been equipped with the modified system, there would have been no need for blocking the boom. Additionally, the manufacturer in its letter of September 29, 1977, observed that such suspension system properly maintained and adjusted would have supported the boom when the lower chord was severed. It follows that had the machine been so equipped, it could have been safely operated for at least the periods at issue in this proceeding.

In Mr. Richardson's favor is the lack of any evidence that either he or any of his peers on the job site had knowledge that the 1260 dragline lacked the modified intermediate boom suspension system. Mr. Richardson testified, and there is no proof to the contrary, that he was without knowledge of the modified suspension system. He denied having any information of this system from the manufacturer, and the literature in evidence sent to him by Bucyrus-Erie does not mention the modification. Other witnesses who worked with him considered the machine to be safe, i.e., Ed Yevincy, oiler and machine operator, and George Wallace Barnett, also a machine operator. This testimony is illogical unless it is considered as their view prior to the accident and without their knowledge of the machine's lack of the supporting modified intermediate boom suspension system which would have prevented collapse. One witness, Wayne T. Bowling, director of all heavy equipment for Peabody, did know that the Sinclair Mine 1260 dragline had not been equipped with the modified system. It is something of a mystery why this information was not communicated to the management of the Sinclair Mine, or to the master mechanics but there is no evidence that it was. Apparently, Mr. Bowling did not know that such equipment was necessary to prevent the boom from falling when a chord is severed, although he should have known this.

Furthermore, Mr. Richardson had seen this boom crack a number of times and either had directed or seen others direct repairs. In none of those instances had the boom been blocked and the repairs had always been conducted safely.

In spite of those factors, Mr. Richardson at least had reason to believe that this 1260 dragline was unsafe. Even though he had no knowledge about the modified intermediate boom suspension system and the safety protection such would have provided, he did have considerable direct knowledge about a potentially dangerous situation. He either knew or had the responsibility for knowing as much as 10 days before the accident that a crack had developed in the boom. Ed Yevincy testified that the pressure gauge had gone down a week or maybe 10 days before. The pressure gauge is an important part of the safety equipment placed on the 1260 dragline. The very purpose of this gauge is to give a warning of a developing hazard. The

manufacturer in its letter of September 29, 1977, refers to it as a "crack

detection and warning system." There is no clear evidence that Mr. Richardson personally knew of this lack of pressure until August 2, but he had the responsibility for operating this machine and should have known that the pressure was down.

More than that, Mr. Richardson knew 2 or 3 days before the accident that a crack had developed and he was told by Bob Coppage on Monday, August 1, that the crack had extended. It not until August 2 at 2 p.m. that Mr. Richardson decided to examine the crack. At that time it was described as "getting worse." Mr. Richardson personally examined the crack, although from some distance, and he determined that it needed quick attention. Even though he could not see the entire crack, he was able to observe about a third of it, which indicated or should have indicated to him a very serious condition. Both Mr. Richardson's actions and his testimony suggest that he knew it was serious. Directly after observing the condition, he began discussions with other personnel about the method of repair. He told Bob Coppage that "we needed to make some repairs pretty quick" (Tr. II, 66). While he testified that he did not believe the machine to be unsafe, he did indicate in response to a question that it should be shut down for repairs "[a]s soon as I got the available equipment to help over" (Tr. II, 67).

Considering the evidence described above, there is no doubt that Mr. Richardson knew that he was faced with a very bad crack. It is also clear and his actions show that he knew it had to be repaired without delay. It follows that he must have known that at some point a complete break in the chord was possible as long as the machine continued to operate. Even if it is accepted, as it must be on the basis of this record, that Mr. Richardson was unaware of the lack of the modified intermediate boom suspension system, there is also no evidence that he knew one way or the other what would happen if the chord broke completely through. It was the kind of situation which would raise a person's suspicion, particularly a mechanic with considerable experience, that something bad was happening which could well endanger personnel in the area. Mr. Richardson clearly had "such information as would lead a person exercising reasonable care to acquire knowledge of the facts in question or to infer its existence," that is, the hazardous and unsafe nature of the broken chord. United States v. Sweetbriar, supra. It is not enough, it seems to me, that Mr. Richardson had allowed the machine to operate with a cracked chord in the past. This means only that the miners were lucky it did not break in the past, not that it was safe or that it should have been considered as safe.

Mr. Richardson was faced with a situation which had the obvious manifestations of a hazard, that is, a serious crack and one that was spreading under use. Mr. Richardson recognized the seriousness of it by actions and words and should have known that he was dealing with a hazard to the miners. In spite of this, he specifically directed that the 1260 dragline continue to operate until the end of the shift.

Respondent argues in its brief that "immediate" does not mean the present instant but "a reasonable time in view of the particular facts and circumstances of the case under consideration." I reject this interpretation of the word "immediate." Although only 15 or 20 minutes were involved after Mr. Richardson had made his inspection and directed the continued operation of the machine, that was sufficient time for the chord to sever and the boom to collapse. The exact time in which the chord would have become completely severed under use was unpredictable. Accordingly, when the hazard was discovered the machine should have been taken out of use immediately, that is, at the exact time of the discovery.

Furthermore, the hazard was something that existed not only for the few minutes mentioned, but, in fact, for perhaps a week or more. The pressure in the gauge was lost a week or 10 days prior to the accident. Mr. Richardson knew at least by August 1 that the lower chord was cracked and that the crack was expanding. The machine constituted a hazard even at that earlier time and Mr. Richardson either knew or should have known this.

Accordingly, for the reasons stated above, I find that Mr. Richardson knew or should have known that the 1260 dragline was unsafe and should have removed it from service immediately. In summary, the evidence establishes a prima facie violation of 30 CFR 77.404(a) by the corporate operator, Peabody Coal Company, and that Respondent, Kenny Richardson, as the agent of such corporation, knowingly authorized, ordered, or carried out such violation.

Alleged Violation of 30 CFR 77.405(a)

The second allegation against Mr. Richardson concerns the standard 30 CFR 77.405(a) which reads in part as follows: "Men shall not work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely."

The charge as stated in the notice of violation dated August 4, 1977 (Petitioner's Exh. No. 7), reads as follows: "Men shall not be required to work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely." The evidence, I believe, is sufficient to establish against Peabody Coal Company a violation of this standard.(FOOTNOTE 5)

Respondent contended or at least seemed to contend during the course of the hearing, that the standard was not applicable to this

particular machine, the 1260 dragline. Respondent appeared to argue that because of the huge nature of the machine the alternatives mentioned by MSHA other than the modified intermediate boom suspension system were not really practical. These alternatives included lowering the boom to the ground or lowering it part way over a spoil pile. Both of these alternatives, as shown on the record, would create some difficulties. Nevertheless, I believe the record is clear that the boom could have been so blocked. The manufacturer in its instructions on field repairs recommends supporting the boom during repairs, in at least some circumstances, that is, where a section of the main chord must be replaced or numerous cracks are to be repaired. This demonstrates quite clearly that the boom can be supported and, of course, there was no other option but to do so in this case where the machine was not equipped with the modified intermediate boom suspension system. The point may be moot for the future, however, since the machine is now equipped with the modified system and in most, if not in all instances of repair, it may no longer be necessary to support the boom.

Respondent also argued that the 1260 dragline was not "mobile" equipment. The machine is large and cumbersome and apparently moves very slowly over the ground. However, it is operated and moved under its own power. In my view, it comes within the definition of the term "mobile" as used in the standard.

Accordingly, I find that the evidence establishes a prima facie case of a violation of the standard 30 CFR 77.405(a) by the corporate operator, Peabody Coal Company. The remaining question is whether or not Respondent, as agent of the corporate operator, "knowingly authorized, ordered, or carried out such violation."

A principal argument of the Respondent is that he had no duty, authority or responsibility for the implementation of the repairs. He claims that such was the responsibility of other master mechanics, including Gail Lee of the second shift, and M. C. Barber, master mechanic of the third shift when the accident occurred. Also, Respondent denies that he instructed anyone to make the repairs and argues that there is lack of any direct evidence to the effect that he authorized, ordered, or carried out the repair procedures (Respondent's Brief, pp. 22-23). He maintains that he was home in bed when the accident occurred and cannot be held accountable for the repair activity.

The record shows that there are eight master mechanics at the Sinclair Mine working on three shifts. Each is in charge of certain machines during their respective shifts. Kenny Richardson, during the day shift, had the responsibility for three machines including the 1260 dragline. According to some of the testimony, the day shift

master mechanics have no greater authority than the master mechanics on other shifts. However, the evidence shows they do have charge of ordering parts since parts are more readily available during the daytime. Furthermore, the daytime master mechanics, even if they do not specifically direct the repair work to be done on other shifts, wield significant influence over the method of such repairs. Wayne T. Bowling, companywide master mechanic, expressed it as follows:

> Q. What is the--you've made a distinction between the day shift master mechanics. Now what is the basis for that distinction if they have similar powers and authority?
>
> A. What is it? They are out at the times when we have the parts. In the daytime they do most of the setting up when there's a better class of people in the daytime for repairs, welders. We have more-experienced people on days a lot of times and that's the distinction we make.
>
> And they know where the parts are and they do their ordering before they turn in to their supply people what they need and the supply people in the daytime what it would take to keep the night shift--to help them out and to get the material down there.
>
> And then they go discuss it with them in the afternoon and they take over where they left off.

(Tr. II, 241).

Mr. Richardson's testimony on his own authority drew a distinction between instructing other master mechanics, and advising them. He generally testified that while he advised on the repairs, he did not instruct the other master mechanics. At one point, however, he testified that he did instruct them about the repairs to be made, but he did not instruct them as to how to do the repairs (Tr. II, 128).

Other witnesses testified, generally, that the daytime master mechanic made the decision on repairs. George Wallace Barnett, day shift operator, stated that materials and parts are ordered on the day shift and that as far as he knew, the master mechanic on the day shift makes the decision on the repairs to be made (Tr. II, 207). Gene Porter, the third shift oiler, testified that he supposed Mr. Richardson was the lead master mechanic at the mine (Tr. II, 225). John Cooper, day shift welder, testified he was told by the superintendent that Kenny Richardson was the lead master mechanic at the Sinclair Mine (Tr. II, 314). Wayne Bowling testified that Mr. Richardson was the "lead master mechanic" over this particular machine (Tr. II, 250). Kenny Richardson, at the investigational hearing conducted after the accident, according to the testimony of a

witness, admitted that he had set up the work procedures for the repair of the boom (Tr. 305). Also, it was Mr. Richardson who contacted Bucyrus-Erie for instructions and assistance.

The evidence outlined above establishes that, at the very least, Mr. Richardson shared the authority for setting up the procedures to repair the boom. He seems to argue because others shared the responsibility that he cannot be held liable. It seems to me that if Mr. Richardson had some responsibility along with others, the mere fact that the others are not charged in this proceeding would not relieve Mr. Richardson of his responsibility. Furthermore, the evidence is sufficient to show that Mr. Richardson was involved to a greater extent than merely sharing the responsibility with other master mechanics. While he claims that he only instructed the other mechanics in how to go about the repair, it is evident from the record that this instruction, in light of the superior authority held by the daytime mechanics, amounted to a virtual direction. It would be unlikely that other mechanics would countermand his instructions and the facts show that they did not do so in this case.

In the discussions and instructions concerning preparing for the repair work, no serious consideration, if any, was given to the matter of supporting the boom. Mr. Richardson gave instructions or advice on the general manner of preparing for the repair, along with certain safety precautions, but he failed to direct or authorize supporting of the boom. The final question under this alleged violation is whether Mr. Richardson knowingly authorized, ordered, or carried out the violation. His knowledge or reason to know is much less clear than with the previously considered violation. In the prior violation the physical evidence was there for him to see; however, this situation is considerably different. In the first place, it was not a common practice to support the boom during repair work. Most of the evidence suggests that it was not considered necessary in the trade to support the boom, though this was probably based on the fact that other similar machines are equipped so as not to collapse. Specifically, it had been Mr. Richardson's prior experience that the boom could be repaired while in its raised position.

The manufacturer's instructions which Mr. Richardson had received prior to the accident indicate certain circumstances where the boom should be supported, but it does not state that this is necessary for safety or otherwise. In fact, the instructions state specifically that in most cases the boom can and should be repaired while supported on the machine in its working position. It is only in certain circumstances, such as where a main chord must be replaced or if numerous cracks are to be repaired, that lowering the boom "may be necessary."

The problem, in part, may have been that other 1260 draglines were equipped with the modified intermediate boom suspension system which, with the machine so equipped, would have supported the boom when the lower chord was severed. The issue here, however, is not whether Mr. Richardson had reason to believe the machine or the procedure was unsafe, as with the prior citation. It is solely whether he knew or should have known the boom was required to be blocked and authorized or ordered the repair without such blocking. It seems to me, considering especially that blocking would not have been necessary with the modified suspension system, that the situation was sufficiently confusing and ambiguous as to preclude a finding of knowledge on Mr. Richardson's part.

Accordingly, for the above-stated reasons, I find that Respondent did not know or have reason to know that the boom of the 1260 dragline should have been supported or blocked while men were working on it with the boom in a raised position.

Mr. Richardson's position is distinguishable from that of the operator. The operator is held to a standard of strict liability in a situation of this nature, whereas for the individual to be liable, he must have "knowingly" participated in the violation. Moreover, the operator in fact had knowledge of the lack of the modified suspension system on the machine because its employee, Mr. Wayne Bowling, was aware of this deficiency. Mr. Richardson had no such knowledge.

Assessment of Civil Penalty

Pursuant to section 110(c) of the Act, a person found in violation "shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d)." Subsection (a) is here applicable and it provides that a violation shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each violation. Under subsection (i) of section 110, the Commission in assessing civil penalties shall consider (a) the operator's history of previous violations; (b) the appropriateness of such penalty to the size of the business of the operator charged; (c) whether the operator was negligent; (d) the effect of the operator's ability to continue in business; (e) the gravity of the violation; and (f) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation. The Board of Mine Operations Appeals held in Daniel Hensler, 5 IBMA 115 (1975), that only two of these criteria are inapplicable, namely, (b) and (d). I will hereafter consider the others.

There is no history of previous violations on the part of Mr. Richardson (Tr. 12). Since Respondent did not personally participate in the abatement of the violation, no weight is given one way or the other to good faith abatement (Tr. 14-15). The violation was

grave in that the collapse could have occurred at any time and up to eleven men were exposed to the hazard of the boom falling (Tr. 180). Mr. Richardson was more than ordinarily negligent in that he knew or should have known of the unsafe condition of the machine over which he had responsibility.

The Secretary has recommended a penalty of $500 for each violation. In light of all the circumstances discussed in this decision, I believe that such a penalty is appropriate and so assess that amount for the knowing authorization, ordering, or carrying out a violation of the mandatory standard 30 CFR 77.404(a). Conclusions

1. The Respondent, Kenny Richardson, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. For the reasons stated above, Respondent knew or should have known that the 1260 dragline was unsafe and by failing to remove it from service immediately, knowingly authorized, ordered, or carried out a violation of 30 CFR 77.404(a).

3. For the reasons stated above, Respondent did not know or have reason to know that the boom of the 1260 dragline should have been blocked or supported while men were working on the boom in a raised position, and accordingly did not knowingly authorize, order, or carry out, as charged, a violation of mandatory standard 30 CFR 77.405(a).

ORDER

It is ORDERED that Respondent, Kenny Richardson, pay the penalty assessed herein in the sum of $500 within 30 days of the date of service of this decision upon him.

Franklin P. Michels
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

FOOTNOTES START HERE

~FOOTNOTE_ONE

1 A hearing was held on this matter on March 21 and 22, 1979, in Evansville, Indiana. Petitioner and Respondent appeared through counsel. The parties have filed posthearing briefs and proposed findings and conclusions and reply briefs. Such proposed findings not adopted or specifically rejected herein are rejected as immaterial or not supported by fact.

The record consists of two volumes of transcript. In referring to the pages in the first volume, the citation will be as follows (Tr.); in referring to the second volume, the reference will be (Tr. II).

~FOOTNOTE_TWO

2 The operator was also charged with violating 30 CFR 77.1713(c) for failing to keep an accurate record of the examination conducted during each shift (Petitioner's Exhibit No. 10; Tr. 77).

~FOOTNOTE_THREE

3 Respondent has also raised a constitutional issue in this proceeding. He contends that section 110(c) of the Act violates certain of his rights guaranteed by the Constitution of the United States. Specifically, he argues that he is subjected to a penalty solely because his employer does business in the corporate form rather than as a partnership or some other business form and that this violates his constitutional right to equal protection of the law. Respondent previously appealed this case on such constitutional issue to the United States Court of Appeals for the Sixth Circuit. This petition was dismissed as premature by the court in an order issued April 25, 1979. The Respondent has preserved this issue. My ruling is the same as that in my prior order of November 28, 1978, in which I rejected this contention as a ground for dismissal.

~FOOTNOTE_FOUR

4 It seems to me that the general solution in light of the language of section 110(c) is to name both the corporate operator and the individual in a joint action. In any such action, the corporate operator should not be permitted to settle the proceeding unless it admits to the alleged violations. Cf. United States v. Consolidation Coal Company and Donald Kidd, 504 F.2d 1303 (6th Cir. 1974). In that case the charge under the criminal subsection of the Act involved both the corporate operator and the individual. Even the Board of Mine Operations Appeals in the Everett L. Pritt case, 8 IBMA 216 (1977), while authorizing a separate trial against the individual, stated that it would be fairer and simpler to join related sections 109(a) and (c) proceedings (now 110(a) and 110(c)).

~FOOTNOTE_FIVE

5 The discussion in the opinion above, with respect to the condition precedent of a violation by a corporate operator, is equally applicable to the alleged violation of this mandatory standard.