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SOL (MSHA) V. FIRE CREEK COAL
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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 Proceedings

Docket No. BARB 79-3-P
A.O. No. 40-01612-03004V

v.

Docket No. BARB 79-4-P
A.O. No. 40-01612-03005V

FIRE CREEK COAL COMPANY OF
TENNESSEE,
RESPONDENT

Docket No. BARB 79-57-P
A.O. No. 40-01612-03001

Docket No. BARB 79-58-P
A.O. No. 40-01612-03002

Docket No. BARB 79-59-P
A.O. No. 40-01612-03003V

Fire Creek No. 1 Mine

DECISIONS

Appearances: Edward H. Fitch, Trial Attorney, Department of Labor,
Office of the Solicitor, Arlington, Virginia, for the
petitioner;
Michael R. Kizerian, Vice President, Fire Creek Coal
Company, Knoxville, Tennessee, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern petitions for assessment of civil penalties filed by the petitioner against the respondent in October 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with a total of 27 alleged mine safety violations issued pursuant to the Act and implementing safety standards. Respondent filed timely answers in the proceedings and requested a hearing regarding the proposed civil penalties initially assessed for the alleged violations. Respondent asserted that due to its adverse financial and economic condition,

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payment of the assessed penalties would directly affect its ability to continue in business. A hearing was held in Knoxville, Tennessee, on February 27, 1979.

Issues

The issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petitions for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for each alleged violation, based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., now the Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978.

2. Sections 109(a)(1) and (a)(3) of the 1969 Act, 30 U.S.C. 819(a)(1) and (a)(3), now section 110(i) of the 1977 Act

Discussion

The alleged violations and applicable mandatory safety standards in issue in these proceedings are as follows:

Docket No. BARB 79-3-P

Section 104(d)(1) Citation No. 140809 issued at 9:25 a.m. on March 15, 1978, cites a violation of 30 CFR 75.302-1, and states as follows:

Line brattice used to provide face ventilation was not installed continuously to within 10 feet of the working face of the No. 3 entry in working section 001, where coal was being mined with a continuous mining machine. The No. 3 entry working place had been developed approximately 100 feet in by the last open crosscut and no line brattice installed.

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The notice was terminated at 10:05 a.m., the same day it issued after the installation of the required line brattice to within 10 feet of the working face.

Docket No. BARB 79-4-P

Section 104(d)(2) Order No. 140845, issued at 9:10 a.m., April 7, 1978, cites a violation of 30 CFR 75.301, and states as follows:

The active workings of the coal mine were not ventilated while miners were working underground in that the main fan was not operating and miners were working underground in No. 1 entry working place removing a fall of roof.

The order was terminated at 9:15 a.m., the same day it issued after the main fan was placed in operation.

Section 104(d)(2) Order No. 140849, issued at 10 a.m., April 7, 1978, cites a violation of 30 CFR 75.301, and states as follows:

Face ventilation was not provided in the Nos. 2, 3, 4, and 5 entry working places in the 001 working section in that ventilation was short circuited at the last open crosscuts. The above-mentioned working places were developed approximately 100 feet in by the last open crosscuts where the ventilation was short circuited.

Section 104(d)(2) Order No. 140850, issued at 10:15 a.m., April 7, 1978, cites a violation of 30 CFR 75.302 and states as follows:

Line brattices were not used continuously from the last open crosscut to the faces of the Nos. 2, 3 and 4 entries in that these working places in 001 working section were developed approximately 100 feet in by crosscuts and no line brattice installed. The in by end of line brattices in No. 5 entry was 50 feet from the face and coal had been mined from the working places.

Section 104(d)(2) Order No. 140851, issued at 10:30 a.m., April 7, 1978, cites a violation of 30 CFR 75.303(a), and states as follows:

A preshift examination of the mine had not been made prior to miners entering the underground area of the mine. A record was not made of preshift examinations since 3-27-78 and dates, times and initials were not in working places. The certified person at the mine stated he had not made an examination and did not know of anyone else making examinations.

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Citations 140849, 140850, and 140851 were all terminated on April 10, 1978, after abatement of the conditions cited.

Docket No. BARB 79-58-P

Section 104(a) Citation 140853, issued at 8 a.m., April 10, 1978, cites a violation of section 103(d) of the Act, and states as follows:

An unintentional roof fall had occurred in the No. 3 entry working place of 001 working section and the operator had not made an investigation of the fall, made a written record or notified the District Office of Coal Mine Safety.

The citation was terminated on April 17, 1978, after abatement of the cited condition.

Docket No. BARB 79-59-P

Section 104(d)(1) Citation No. 140808, issued at 9:20 a.m., March 15, 1978, cites a violation of 30 CFR 75.301-1, and states as follows:

Face ventilation was not provided in the No. 3 heading working place in 001 working section where coal was being mined with a continuous mining machine. Ventilating devices were not installed in the working place and coal was being mined 100 feet in by the last open crosscut. The section foreman was operating a mine tractor and had just brought a load of coal to surface.

The citation was terminated at 10:05 a.m., the same day it issued after abatement of the condition cited.

Docket No. BARB 79-57-P

This docket concerns a total of 20 section 104(a) citations issued by Federal mine inspector Harrison R. Boston as follows:

March 15, 1978

Citation No. 140810, 30 CFR 75.303(a), failure to make an adequate preshift examination.

Citation No. 140811, 30 CFR 75.301, failure to provide face ventilation in four entries in the 001 working section, and failure to provide line brattice or other ventilation devices.

Citation No. 140812, 30 CFR 75.302, failure to use line brattice or other approved ventilation devices to provide ventilation to working places in the 001 working section.

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Citation No. 140813, 30 CFR 75.316, failure to install permanent stoppings in the third crosscut outby the working face in the 001 working section as required by the approved mine ventilation system and methane and dust control plan.

Citation No. 140814, 30 CFR 75.503, failure to maintain a tractor in permissible condition by failing to provide padlocks for the battery receptacles, and failing to secure battery cover lids as required by schedule 2-G.

Citation No. 140815, 30 CFR 75.503, failure to maintain a scoop in permissible condition by failing to provide padlocks for the battery receptacles, and failing to secure battery cover lids as required by schedule 2-G.

Citation No. 140816, 30 CFR 75.202, failure to support roof at the 001 section rectifier station for a width of 8 feet and a distance of 18 feet directly around the rectifier. Posts had been installed, but were taken out to install the rectifier.

Citation No. 140817, 30 CFR 75.523-1, inoperative deenergization switch on a roof-bolting machine.

Citation No. 140818, 30 CFR 75.523-2(c), inoperative deenergization activating bar on a continuous mining machine.

March 16, 1978

Citation No. 140819, 30 CFR 75.316, failure to supplement the mine ventilation system and methane and dust control plan by failing to submit required mine maps and other required information.

Citation No. 140820, 30 CFR 75.1704-2(d), failure to post a map of the 001 working section escapeway.

Citation No. 140821, 30 CFR 75.1100-2(d), failure to provide a portable fire extinguisher for the mine tractor, serial No. 270A-509, used to pull loaded coal cars from the 001 working section.

Citation No. 140822, 30 CFR 75.1100-2(d), failure to provide a portable fire extinguisher for mine tractor, serial No. 270A-510.

Citation No. 140823, 30 CFR 75.307-1, failure to conduct a methane examination at the face of the No. 5 entry working place in the 001 working section prior to the entrance of an electrically-operated roof-bolting machine.

Citation No. 140824, 30 CFR 75.503, failure to maintain the scoop, serial No. 482-1022, used inby the last open crosscut in the 001 working section in a permissible condition in that the headlights were inoperative.

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April 7, 1978

Citation No. 140843, 30 CFR 75.1600-1, failure to provide a responsible person on duty at the surface communication facility to answer communications from three miners who were underground.

Citation No. 140844, 30 CFR 75.1713, failure to provide an emergency communications system to the nearest point of medical assistance.

Citation No. 140847, 30 CFR 75.503, inoperative headlights and lack of padlocks on the Unitrack scoop and scoop battery receptacle.

Citation No. 140848, 30 CFR 75.200, failure to submit a plan detailing cleanup and support procedures concerning a roof fall as required by the approved roof-control plan of May 20, 1977, page 7, item 19.

Citation No. 140852, 30 CFR 75.300-4, failure to maintain a record of the daily fan examination, the last recorded date being March 27, 1978.

Findings and Conclusions

Fact of Violations

Respondent did not contest any of the citations issued in these cases, and except for a few comments and observations made during the course of the hearing, did not rebut any of the citations and candidly admitted that he was responsible for them (Tr. 18-21). In the circumstances, I find that petitioner has established the fact of violation as to each of the citations issued in these proceedings.

Gravity

Except for Citation No. 140817 (Docket BARB No. 79-57-P), concerning a roof-bolting machine deenergization device, petitioner stipulated that all of the remaining citations issued in these proceedings were in the moderate to low range of seriousness and that the inspector who issued the citations did not believe that any of the citations were of "great severity" (Tr. 10-11, 23). Petitioner also pointed out that the mine is only developed some 500 feet high on a mountain, thereby eliminating any real ventilation problems, and no methane has ever been detected (Tr. 10).

After careful review of the evidence adduced, including copies of the citations issued by the inspector, I conclude and find that all of the violations cited in these proceedings were serious.

Negligence

Petitioner stipulated that except for the section 104(d) orders, all of the other violations in these cases resulted from ordinary negligence on the part of the respondent (Tr. 12). Petitioner takes the position that the section 104(d) orders resulted from gross negligence on the part of the respondent (Tr. 12). Respondent conceded that both he and the persons hired to manage the mine should have been aware of the conditions cited, and he conceded that failure to correct the conditions cited constituted ordinary negligence (Tr. 22). Aside from the fact that the section 104(d) orders were issued, petitioner has presented no evidence or testimony supporting the assertion that the violations resulted from gross negligence. I find nothing in the record to support a conclusion that respondent deliberately and recklessly disregarded the safety standards cited. He candidly admitted that as the mine operator, he was responsible, along with the hired mine manager, for the safe operation of the mine. However, the manager is no longer employed by the respondent, and petitioner agrees that marked improvements have been made in the operation of the mine. In the circumstances, I find that all of the violations resulted from ordinary negligence on respondent's part and the conditions cited were conditions which respondent admits he should have been aware of and should have corrected.

Good Faith Compliance

The present mine operator took over the operation and ownership of the mine in May 1977, and he instituted changes in the mine's management, including replacing the prior mine manager. Petitioner agrees that the respondent has taken steps to improve its mining practices to insure that the mine is operated safely, and that prior to taking over the mine, the present owners had no previous mining experience and had to rely on its prior manager who has since left the employ of the company (Tr. 65-66, 68). As for the citations in question in these proceedings, the record supports a finding that they were timely abated and that respondent exercised normal good faith in abating the conditions once the conditions were brought to his attention. The parties stipulated that all of the citations issued in these proceedings were timely abated and that the respondent exercised good faith in correcting the conditions once they were brought to his attention (Tr. 21), and this is supported by statements made by counsel on the record with respect to conversations he had with MSHA mine inspector Harrison R. Boston, the inspector who issued all of the citations and orders in these proceedings.

History of Prior Violations

Petitioner has submitted a computer printout reflecting respondent's prior history of violations. That document reflects that 75 violations were issued for the period May 20, 1977, to March 12,

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1979, and that respondent has made payment for 26 violations during that period of time. Petitioner asserts that this reflects a moderate history of previous violations, and I agree and adopt that proposed finding as my finding on this issue.

Size of Business and Effect of Penalties Assessed on Respondent's Ability to Continue in Business

The evidence adduced in these proceedings reflects that the present mine owners took over the operation of the mine on May 20, 1977, and that total mine production since that time amounts to some 15,000 tons of coal (Tr. 29, Exh. R-5). Copies of an MSHA quarterly mine employment and coal production reports reflect that the 1978 mine production was 7,620 tons, and that mine employment was seven workers underground and three workers on the surface, with a seasonal employment for 3 months of 53 employees (Exh. R-8). The mine was shut down for 3 months from July to November 1978, and this was corroborated by petitioner (Tr. 36). The mine presently employs seven miners, and during the time the violations issued, employed 9 to 10 fulltime miners (Tr. 47). The mine is a nonunion drift mining operation using a conventional miner, and petitioner stipulated that the mine is a very small mining operation which at one time was being improperly supervised, but which appears to be on its way to functioning much safer with the individuals now operating it.

The initial assessments made in these cases by MSHA's Office of Assessments did not take into consideration the financial plight of respondent's mining operations (Tr. 13-14). At the hearing in this matter, respondent (Michael Kizerian) submitted detailed documentary evidence concerning the financial condition of the company. Included are copies of financial statements for the year ending June 30, 1978, billings from creditors, checkbook bank records indicating deposits and payments made on the company account, bank statements, State of Tennessee Department of Revenue and Taxation records indicating state severance taxes paid for coal produced by the respondent's mine, and State and local sales and use tax returns (Exhs. R-1 through R-6).

The testimony and evidence adduced by the respondent in these proceedings reflects that for the initial 13 or 14 months of its operation, the mine lost \$277,898.47, and that as of February 1979, respondent has outstanding debts in terms of accounts payable in the amount of \$70,206.37, and which do not include a price adjustment penalty levied on the respondent by the TVA charging respondent's account for \$8,587.05 for failure to guarantee the dry ash content of its product. Respondent testified that he is concerned over the fact that he cannot meet his expenses since he wants to pay his bills. However, he stated that one of the reasons that he did not contest the violations cited against him is the fact that he is on the verge

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of going out of business, that he is operating from week-to-week with some \$70,000 in outstanding debts, and that one major breakdown at the mine will place his operation in jeopardy (Tr. 58-59).

The Fire Creek Coal Company is a mining venture and wholly owned subsidiary of Real Estate West, an investment company operated by Mr. Kizerian's father in Utah. Mr. Kizerian was hired by his father to operate the coal mining venture known as Fire Creek Coal Company, and he is compensated by the coal company (Tr. 51-56). Real Estate West is not in the primary business of mining coal, and petitioner suggested that absent any evidence to the contrary, the question of the amount of civil penalties which should be assessed for the violations in question in these proceedings should be directed toward the operations of Fire Creek Coal Company and its ability to remain in the coal mining business (Tr. 56).

Petitioner has filed posthearing arguments concerning the financial condition of the respondent, including an analysis of the documentary evidence concerning this issue. Petitioner asserts that the information submitted supports a finding that payment of normally reasonable fines for the violations would, in fact, have an adverse effect on the respondent's ability to remain in the business of mining coal. In support of this conclusion, petitioner argues that the controlling company here, Real Estate West, has been heavily subsidizing this coal mining venture, and that the records indicate that the current payable liabilities are in excess of \$48,000 and that long term debt to Real Estate West is in excess of \$400,000. Petitioner submits that civil penalties in the aggregate of \$2,000 will not cause the respondent to go out of business, and that petitioner is agreeable to a schedule of up to four payments for the respondent to pay whatever penalties are assessed in the matter.

In Robert G. Lawson Coal Company, 1 IBMA 115, 117-118 (1972), the former Board of Mine Operations Appeals made the following observations:

We view the provisions of section 109(a)(1) as manifesting an intent by Congress to require a balancing process in arriving at an appropriate penalty to be assessed in any given case. Application of the criteria of section 109(a)(1) requires weighing the importance of imposing pecuniary penalties, as a measure of deterring insufficient concern for the health and safety of miners, against other deterrents specified in the Act, such as closure orders. The amount of a monetary penalty imposed should be sufficiently high to deter any laxity of vigilance on the part of an operator to keep his mine in compliance with the Act. In our view, however, the imposition of a penalty which would cripple an operator's

ability to continue his production of coal without a counter-balancing benefit to the safety of miners would not be appropriate.

We do not view the civil penalty assessment procedure as a tool to force closure of mines; we look upon it as an auxiliary tool to bring about compliance. The Act contains several enforcement provisions permitting the closure of mines to protect the health and safety of miners. We believe that the intent of Congress was to give the Secretary great latitude in the assessment of monetary penalties so as to permit him to weight the equities and render justice on a case-by-case basis. Of course, in doing so we must be particularly conscious of two of the statutory criteria--the size of the operator's business and the effect of a penalty on the operator's ability to continue in business. The most severe penalty authorized by the Act is mine closure with its consequent loss of production, idlement of miners, and impact upon both the operator and the public. We believe Congress intended a balanced consideration of all statutory factors, including the size of mine and the ability to remain in business, to permit assessments which would be equitable and just in all situations but which would not have the effect of drastically curtailing coal production or employment of miners to the ultimate detriment of the public interest.

Where numerous violations are found and cited during a tour of inspection, the aggregate amount of the proposed assessments, even though each separate violation may be assessed at a nominal value, may be an amount beyond the operator's ability to pay, and thus, for no other reason than this, may be unreasonable. In such cases it is incumbent upon an Examiner and this Board to look at the total amount and impact of the monetary penalty in arriving at a fair assessment.

The Board followed its Lawson Coal reasoning with respect to the question of the effect of civil penalties on small operators in two subsequent decisions, Newsome Brothers, Inc., 1 IBMA 190 (1972), and Hall Coal Company, 1 IBMA 175 (1972). In Hall, the Board also ruled that in addition to the six statutory criteria, a civil penalty may also be mitigated by the fact that the infraction was a first offense, committed shortly after the effective date of the Act, by a small operator who demonstrated good faith by immediate abatement. The Board also observed that there is a presumption that such an operator will not be affected adversely by the imposition of a sizeable civil penalty, but that it is incumbent upon the operator to present evidence of an adverse effect of a monetary penalty upon his mining operation.

After careful review of all of the evidence adduced in these proceedings, I am in agreement with petitioner's proposed finding that the imposition of the initial civil penalty assessments recommended in these dockets, would in the aggregate, effectively put respondent out of business. Having viewed respondent's chief witness on the stand during the course of the hearing, I find he is a candid and honest individual. He voluntarily produced his company financial records, including bank statements, ledgers, tax returns, operating expenses, income statements, etc., and I find his testimony to be credible. Considering the fact that the respondent is a very small operator and is in serious financial difficulties, as attested to by the evidence adduced herein, I find that the proposed civil penalties in the total amount of \$8,830 could jeopardize respondent's ability to remain in business. I therefore conclude that the circumstances presented justifies mitigation of the initial assessments made in these proceedings, and should be considered by me in assessing appropriate penalties.

In view of the foregoing findings and conclusions, respondent is assessed civil penalties for the violations which have been established as follows:

Docket No. BARB 79-3-P

Citation No.	Date	30 CFR Standard	Assessment
140809	03/15/78	75.302-1	\$150

Docket No. BARB 79-4-P

Citation No.	Date	30 CFR Standard	Assessment
140845	04/07/78	75.301	\$350
140849	04/07/78	75.301	300
140850	04/07/78	75.302	300
140851	04/07/78	75.303(a)	100

Docket No. BARB 79-58-P

Citation No.	Date	30 CFR Standard	Assessment
140808	03/15/78	75.301-1	\$ 80

Docket No. BARB 79-57-P

Citation No.	Date	30 CFR Standard	Assessment
140810	03/15/78	75.303(a)	\$ 60
140811	03/15/78	75.301	100
140812	03/15/78	75.302	50

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140813	03/15/78	75.316	40
140814	03/15/78	75.503	20
140815	03/15/78	75.503	20
140816	03/15/78	75.202	50
140817	03/15/78	75.523-1	75
140818	03/15/78	75.523-2(c)	35
140819	03/16/78	75.316	20
140820	03/16/78	75.1704-2(d)	15
140821	03/16/78	75.1100-2(d)	20
140822	03/16/78	75.1100-2(d)	20
140823	03/16/78	75.307-1	25
140824	03/16/78	75.503	20
140843	04/07/78	75.1600-1	25
140844	04/07/78	75.1713	25
140847	04/07/78	75.503	30
140848	04/07/78	75.200	50
140852	04/07/78	75.300-4	20

ORDER

Respondent is ORDERED to pay the civil penalties assessed herein, in the amount of \$2,000, within thirty (30) days of this order, or within a mutually agreeable time schedule which may be negotiated with the petitioner.

George A. Koutras
Administrative Law Judge