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SOL (MSHA) V. SKYVIEW MINING
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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 Proceeding	
	Docket Nos.	Assessment Control Nos.
	PIKE 78-365-P	15-09746-02005V
v.	PIKE 78-380-P	15-09746-02006
SKYVIEW MINING, INC., RESPONDENT	No. 4 Mine	

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, Department of Labor, for Petitioner;
Harold Akers, President, Skyview Mining, Inc., Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated October 11, 1978, a hearing in the above-entitled proceeding was held on November 14, 1978, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

The Petitions for Assessment of Civil Penalty in Docket Nos. PIKE 78-365-P and PIKE 78-380-P were filed on May 12, 1978, and June 8, 1978, respectively, and each Petition seeks assessment of a civil penalty for one alleged violation of the mandatory safety standards.

Completion of the Record

Respondent's president asked that his company's financial condition be considered in the assessment of penalties. As part of respondent's evidence, respondent agreed to provide bank statements received by respondent from the time respondent stopped mining coal in June 1978 up to the time of the hearing held in November 1978. It was agreed at the hearing that the bank statements would be provided to me after all testimony had been received and that I would mark the bank statements as exhibits and would receive them in evidence at the time I prepared my decision in this proceeding (Tr. 23).

A one-page statement of account for Skyview Mining, Inc., issued on July 31, 1978, by the First National Bank of Pikeville is marked as Exhibit A; a one-page statement of account dated August 31, 1978, is marked as Exhibit B; a one-page statement of account dated September 30, 1978, is marked as Exhibit C; and a one-page activity statement dated October 31, 1978, is marked as Exhibit D. Pursuant to the agreement of the parties, Exhibits A through D are received in evidence (Tr. 22-24).

Issues

The issues raised by the Petitions for Assessment of Civil Penalty are whether violations of 30 CFR 75.523 and 30 CFR 75.200 occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. At the hearing, respondent stipulated that the alleged violations occurred. Therefore, it was agreed that insofar as the criteria of negligence and gravity were concerned, penalties would be assessed on the basis of the conditions set forth in the inspector's notices of violation which were attached to the Petitions. Respondent, however, did elect to present evidence concerning two of the six criteria, namely, the size of respondent's business and the question of whether payment of penalties would affect respondent's ability to continue in business (Tr. 4).

I shall hereinafter make findings of fact with respect to the six criteria and penalties will thereafter be assessed based on those findings.

History of previous violations

The inspector who wrote the notices of violation here involved stated that there is no history of previous violations to be considered (Tr. 15). Therefore when penalties are hereinafter assessed, it will be unnecessary to consider the criterion of history of previous violations.

Appropriateness of penalty to size of operator's business

Respondent opened the No. 4 Mine in 1976. The mine was developed with three entries for a distance of about 1,500 feet. Respondent then pulled out of the mine, extracting pillars as it withdrew. All coal reserves were exhausted at that point (Tr. 7-8).

During the time that the No. 4 Mine was in operation, respondent employed five miners to produce about 200 tons of coal per day. Respondent's equipment consisted of a scoop, loading machine, roof-bolting machine, and two Joy end-dump shuttle cars. The coal was shot from the solid, that is, no cutting machine was used before the coal was blasted loose. Respondent did not have conveyor belts and

all coal was transported to the surface in the shuttle cars (Tr. 6-8; 18).

On the basis of the facts given above, I find that respondent operated a small mine and that any penalties which are hereinafter assessed should be in a low range of magnitude to the extent that the penalties are based on the size of respondent's business.

Effect of penalties on operator's ability to continue in business

Summary of Respondent's Evidence Regarding Its Financial Condition

Skyview Mining, Inc., is a family corporation which was formed by the issuance of 300 shares of stock. The president of the corporation testified as a witness at the hearing. He owned 100 shares of stock, a cousin owned another 100 shares, and two other family members owned 50 shares each (Tr. 6). After the coal reserves in the No. 4 Mine had been exhausted, the members of the corporation recognized that they were not getting along harmoniously in running the corporation. Each of the four family members who had advanced capital to form Skyview Mining, Inc., was repaid in full and the president of Skyview Mining formed another corporation under the name of A. A. & W. Coal, Inc. When Skyview Mining, Inc., stopped mining coal in June 1978, it had in its possession a roof-bolting machine and a scoop on which a total amount of $75,000 was owed. A. A. & W. assumed Skyview's payments on the scoop and roof-bolting machine in return for the use of the equipment in the new mine which A. A. & W. had opened (Tr. 9-11).

Skyview's president testified at the hearing that the balance in Skyview's bank account amounts at the present time to about $1,300 and that there are no outstanding obligations to be paid from that balance other than the payment of civil penalties for violations of the mandatory health and safety standards. The president said that if respondent only owed for the two violations which are involved in this proceeding, he would not be concerned about having enough money in respondent's account to pay all penalties. The president noted, however, that respondent also owes penalties for several other violations which occurred while respondent was producing coal, but which have not yet become the subject of civil penalty proceedings. Skyview's president stated that he believed that the Assessment Office had proposed total penalties for all outstanding violations which would be greater than the assets which Skyview has for payment of such penalties (Tr. 13-14).

Discussion. Any findings that I make must be based on the facts presented by the parties. Examination of the bank statements submitted by respondent's president makes it difficult to find that respondent would be unable to pay any penalties that might be assessed in this proceeding. I base that conclusion upon several facts in the record.

First, Exhibit A shows that the other corporation, A. A. & W., formed by respondent's president advanced $10,300 to Skyview's account in order to pay taxes and compensation owed by Skyview. Second, although respondent's president stated that he did not have authority as president of A. A. & W. to assume any of Skyview's obligations except for the roof-bolting machine and scoop which A. A. & W. is using, Exhibit A clearly shows that A. A. & W. advanced $10,300 to Skyview in July 1978 to enable Skyview to pay taxes and other obligations.

The burden was on respondent to show that payment of penalties would have caused respondent to discontinue in business if it had not already done so. Alternatively, the burden was on respondent to demonstrate that if it had had to pay civil penalties when it was producing coal, such payments would have had an adverse effect on its ability to continue in business. The evidence shows instead, however, that respondent discontinued in business because all the coal reserves in the No. 4 Mine had been exhausted (Tr. 7). Although respondent's president testified that Skyview could not afford at the present time to open a new mine because it now costs about $75,000 more to open a new mine than it did in 1976 (Tr. 8-9), the president later stated that the problem of Skyview's being able to continue in business was not a question of raising capital, but a question of the "family" stockholders' ability to run the corporation in an amiable fashion (Tr. 11).

The evidence also shows that A. A. & W. has assumed Skyview's obligations as to payment for equipment and payment of taxes. While respondent's president stated that he did not have authority to assume any of Skyview's other obligations (Tr. 12), it is a fact that the penalties which are sought in this proceeding relate to violations which occurred while Skyview was mining coal and therefore the payment of civil penalties is as much an obligation to be met by Skyview as the payment of taxes. There was certainly a balance in respondent's account as of the date of the hearing to pay any penalties which might be assessed in this proceeding.(FOOTNOTE 1)

Good faith effort to achieve rapid compliance

Notice No. 12 RHH was written on February 1, 1977, citing respondent for failure to have an adequate panic bar on its Joy loading machine. The notice of termination was written on February 17, 1977, after two short extensions of time had been granted. Inspectors normally consider that an operator has shown good faith efforts to achieve rapid compliance when the violations are corrected within the time originally given or within the time given in notices of extension of time.

The other notice of violation involved in this proceeding, Notice No. 7 RHH, was also written on February 1, 1977. One extension of time was given and the violation was corrected by the expiration of the extended time period.

Based on the notices of extension of time and notices of termination, I find that respondent showed a normal good faith effort to achieve rapid compliance with respect to each notice of violation. Therefore, when penalties are hereinafter assessed, respondent will be given full credit for having achieved rapid compliance.

Gravity and Negligence

Docket No. PIKE 78-365-P

Notice No. 7 RHH (7-8) 2/1/77 75.200

Findings. Section 75.200 requires each operator of a coal mine to submit to MSHA and to adopt a roof-control plan suitable to the roof conditions and mining system of each coal mine. Respondent's roof-control plan provides that roof bolts are to be installed on 4-foot centers. Respondent violated the provisions of its roof-control plan by installing roof bolts in the No. 1 through No. 5 entries in widths ranging from 5 to 15 feet from the rib line, starting at spad No. 1525. The violation was very serious because distances of up to 15 feet between roof bolts expose the roof to unusual stress with the result that a roof fall is likely to occur. Respondent was grossly negligent in installing roof bolts at distances which were almost four times the spacing permitted by its roof-control plan.

Conclusions. Roof falls continue to be the primary cause of deaths and injuries in underground coal mines. Even though respondent was a small operator, a roof-control violation of the gravity and high degree of negligence which is here involved warrants assessment of a penalty of $300. There is no history of previous violations to be considered.

Docket No. PIKE 78-380-P

Notice No. 12 RHH (7-13) 2/1/77 75.523

Findings. Section 75.523 requires that electric face equipment be provided with devices which will permit the equipment to be deenergized quickly in the event of an emergency. Respondent violated section 75.523 because its Joy loading machine had not been provided with an adequate panic bar having proper design. The inspector's notice shows that respondent had equipped the loading machine with a panic bar but it was not properly designed. Since respondent had made an effort to provide a panic bar, there was a low degree of negligence. The fact that two notices of extension of time had to be issued for the reason that additional time was needed to obtain a satisfactory panic bar is an indication that respondent had difficulty in locating or designing the proper type of panic bar. Moreover, the inspector's notice does not say that the panic bar was inoperable. Consequently, I conclude that the panic bar would work but was not as long or in as convenient position as it should have been. In such circumstances, the evidence shows that the violation was only moderately serious.

Conclusions. Considering that a small operator is involved, that there was a low degree of negligence, that the violation was only moderately serious, and that there is no history of previous violations, a penalty of $15 will be assessed for this violation of section 75.523.

Summary of Assessments and Conclusions

(1) On the basis of all the evidence of record and the foregoing findings of fact, respondent is assessed the following civil penalties:

Docket No. PIKE 78-365-P		
Notice No. 7 RHH (7-8) 2/1/77	75.200	$ 300.00
Total Assessments in Docket No. PIKE 78-365-P		$ 300.00
Docket No. PIKE 78-380-P		
Notice No. 12 RHH (7-13) 2/1/77	75.523	$ 15.00
Total Assessments in Docket No. PIKE 78-380-P		$ 15.00
Total Assessments in This Proceeding		$ 315.00

(2) Respondent at all pertinent times was the operator of the No. 4 Mine and as such is subject to the provisions of the Act and to the health and safety standards promulgated thereunder.

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WHEREFORE, it is ordered:

Skyview Mining, Inc., is assessed civil penalties totaling $315.00 which it shall pay within 30 days from the date of this decision.

Richard C. Steffey
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. It should be noted that respondent still has in its possession two shuttle cars and a loading machine (Tr. 8) on which no debts are presumably owed because A. A. & W. did not have to assume any payments on that equipment to keep it from being repossessed when respondent stopped producing coal. Therefore, if respondent should not have enough funds in its checking account to pay penalties on all outstanding violations, and if A. A. & W. does not wish to deposit additional funds into respondent's account, respondent should be able to sell some of its equipment to obtain money for payment of civil penalties because the evidence indicates that respondent has no plans to open any more coal mines (Tr. 11).