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SOL (MSHA) V. BLACK JACK COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. BARB 79-157-P A.C. No. 15-09816-03002
v.	No. 1 Surface Mine
BLACKJACK COAL COMPANY, INC., RESPONDENT	

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner
Larry Cleveland, Esq., Frankfort, Kentucky, for
Respondent

Before: Administrative Law Judge Steffey

Pursuant to written notice dated April 12, 1979, a hearing in the above-entitled proceeding was held on May 16, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty in this proceeding was filed on December 13, 1978, and seeks to have civil penalties assessed for three alleged violations of the mandatory health and safety standards by respondent.

Issues

In a civil penalty proceeding, the issues normally raised by the Petition for Assessment of Civil Penalty are whether violations occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. In this proceeding, counsel for respondent stipulated that the violations alleged in MSHA's citations had occurred and that the only matters which he wished to have me consider are those pertaining to the six criteria (Tr. 3).

Four of the six criteria may usually be given a general evaluation, but in this proceeding it is preferable to consider on a generalized basis only two of the criteria, namely, the size of respondent's business and the question of whether the payment of penalties would cause respondent to discontinue in business. The remaining four criteria, that is, respondent's good

faith effort to achieve rapid compliance, respondent's negligence, if any, the gravity of the violations, and respondent's history of previous violations, will be considered on an individual basis when the parties' evidentiary presentations are hereinafter reviewed. The two criteria concerning the size of respondent's business and whether the payment of penalties would cause respondent to discontinue in business are considered below.

Size of Respondent's Business

The three citations to be considered in this proceeding were all written on April 12, 1978. At that time, respondent's mine employed about 20 men and produced approximately 500 tons of coal per day from the Little Caney coal seam (Tr. 6-7). At the time of the hearing, which was held on May 16, 1979, respondent was employing between 60 and 70 miners and was producing about 290,000 tons of coal per year, or about 1,160 tons per day, assuming that the coal mine operated 250 days each year (Tr. 51). Those facts support a finding that respondent is a relatively small operator and that penalties should be assessed in a fairly low range of magnitude insofar as the penalties are determined under the criterion of the size of respondent's business.

Effect of Penalties on Operator's Ability To Continue in Business

Respondent's witness testified that assessment of penalties in the range proposed by the Assessment Office, that is, \$150 for each alleged violation, would not be likely to cause respondent to discontinue in business. A company which has tripled its working force in a period of about 1 year is not likely to discontinue in business even if penalties considerably greater than \$150 were to be assessed. Inasmuch as respondent is operating a strip mine, it is likely that exhaustion of suitably located coal reserves is more likely to cause it to discontinue in business than payment of penalties.

Citation No. 123424 April 12, 1978 77.107 (Exhibit 2)

Findings. Section 77.107 requires every operator of a coal mine to provide a program approved by the Secretary for the training and retraining of personnel in the tasks which they are required to perform as certified and qualified persons. Respondent stipulated that the violation occurred (Tr. 3). The violation was moderately serious because there is no way to be certain that mine personnel have been scheduled to receive training in such subjects as first aid, mine rescue, safety regulations, use of self-rescuer, methods for detecting methane and oxygen deficiency, etc., unless respondent has a written program providing for such training. Respondent was negligent in failing to have a program because such programs were required to be submitted on or before September 30, 1971, and respondent should certainly have submitted the program by April 12, 1978 (Tr. 9-20).

Conclusions. Respondent's witness stated that he was certain that he had certified persons at his mine, but he was unaware that they had to be retrained on an annual basis (Tr. 45-46). It is no doubt difficult to keep

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abreast of the regulations, but the former Board of Mine Operations Appeals held in Freeman Coal Mining Co., 3 IBMA 434 (1974), that the operator is conclusively presumed to know what the mandatory health and safety standards are. The mine foreman did not have a card to show that he had received the necessary annual retraining in the required subjects (Tr. 20).

The inspector conceded that respondent's personnel appeared to be competent in operating their equipment but he stated that he could not conclude from their ability to operate equipment that they also knew how to administer first aid in case of an accident nor that they knew how to test for oxygen deficiency or the presence of methane (Tr. 18). The fact that a mine foreman may at some time have had an initial course in first aid is not a reason to reduce the degree of negligence involved in respondent's failure to submit a training program for MSHA's approval as required by section 77.107.

Considering that respondent operates a relatively small business, that the violation was moderately serious, that respondent was negligent, that respondent showed a normal good faith effort to achieve compliance, and that respondent has not previously violated section 77.107, a penalty of \$75 will hereinafter be imposed.

Citation No. 123425 April 12, 1978 77.106 (Exhibit 4)

Findings. Section 77.106 requires the operator of each coal mine to maintain a list of all certified and qualified persons. Respondent stipulated that a violation of section 77.106 had occurred (Tr. 3). The violation was nonserious. Respondent was negligent in failing to maintain a list of certified and qualified persons (Tr. 21-30).

Conclusions. In the inspector's opinion, it is important for each operator of a coal mine to make a list of the persons who are certified at his mine so that everyone will know which person is in charge in case a miner should be injured (Tr. 24). On cross-examination, the inspector conceded, however, that the miners would expect the foreman to be in charge in case of an emergency (Tr. 28).

The operator submitted to MSHA's office located in Barbourville, Kentucky, a list of three persons for the purpose of complying with section 77.106. The list was received in evidence as Exhibit 10. The three persons whose names appear on the list received a first-aid course, but the list does not indicate the dates on which the three persons received first-aid training. Nevertheless, the inspector stated that he had been accepting a list such as that submitted by respondent as satisfactory compliance with section 77.106 (Tr. 32-33).

Considering that a moderately small operator is involved, that the violation was nonserious, that ordinary negligence was involved, that respondent showed a normal good faith effort to achieve compliance, and that respondent has not previously

violated section 77.106, I believe that a penalty of \$25

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is reasonable, especially since the charge in Citation No. 123424 for failure to have a training program somewhat overlaps the charge in Citation No. 123425 for failure to submit a list of certified persons.

Citation No. 123426 April 12, 1978 77.1000 (Exhibit 6)

Findings. Section 77.1000 requires each operator to establish and follow a ground control plan for the safe control of all highwalls, pits, and spoil banks to be developed at his mine. It was stipulated that respondent had violated section 77.1000 (Tr. 3). The violation was nonserious because the inspector stated that respondent's highwall and spoil bank were both stable and that he saw no violation in the way respondent was controlling his highwall. Respondent was negligent for failing to have and to submit a ground control plan (Tr. 37-41).

Conclusions. Respondent's witness stated that he thought the ground control plan was associated with the surface mining regulations which are administered by the Department of the Interior. He understood that those regulations were to become effective on May 3, 1978. He said he was, therefore, surprised to be cited on April 12, 1978, for failure to have a ground control plan (Tr. 50; 60). It is difficult to keep informed as to all the regulations pertaining to mining coal, but respondent's witness stated on cross-examination that he had not tried to obtain clarification as to the regulations even though his mine is not far from the MSHA office at Hazard, Kentucky (Tr. 54). Additionally, Exhibit 1 indicates that respondent was previously cited for a violation of section 77.1000 on July 15, 1976. That previous violation should have made him acutely aware of the fact that he was required to establish a ground control plan and submit it to MSHA before May 3, 1978.

Respondent's witness did, however, appear to be sincerely interested in complying with all safety regulations and he stated that he had been mining coal for 3 years without ever having had a lost-time accident at his mine (Tr. 47). Respondent's witness stated that he had asked for a hearing on the three violations involved in this proceeding primarily because he wanted to receive some clarification about the training program he had been cited for not having and about whether the ground control plan was required in April at the time he received the citation (Tr. 54-57).

Considering that a relatively small business is involved, that the violation of section 77.1000 was nonserious in the circumstances, that respondent was negligent for failing to submit the plan to MSHA, and that there was a good faith effort to achieve compliance, a penalty of \$50 would have been assessed. Exhibit 1 shows, however, that respondent has violated section 77.1000 on a previous occasion. That tends to offset the operator's claim that he thought a ground control plan was one of the requirements of the new surface mining regulations which were not effective on April 12, 1978, when the instant violation of section 77.1000 was cited. Therefore, the penalty will be

increased by \$25 to \$75 because of respondent's history of a previous violation.

Summary of Assessments and Conclusions

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

Citation No. 123424	4/12/78	77.107.....	\$ 75.00
Citation No. 123425	4/12/78	77.106.....	25.00
Citation No. 123426	4/12/78	77.1000.....	75.00

Total Assessments in This Proceeding..... \$ 175.00

(2) Respondent was the operator of the No. 1 Mine at all pertinent times and, as such, is subject to the provisions of the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay civil penalties totaling \$175.00 as summarized in paragraph (1) above.

Richard C. Steffey
Administrative Law Judge