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SOL (MSHA) V. COALTRAIN  
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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. MORG 79-26-P  
A.O. No. 46-05452-03001

v.

No. 1 Strip Mine

COALTRAIN CORPORATION,  
RESPONDENT

ORDER

The captioned petition for assessment of civil penalties was filed on November 22, 1978, and answered by the operator in a letter filed on December 21, 1978. Upon the operator's failure to fully comply with the requirements of the Pretrial Order of May 1, 1979, a default order issued assessing as final the reduced penalties recommended by counsel for the Secretary in his pretrial response filed May 25, 1979. The Commission directed the matter for review sua sponte, found there was no default, and by decision of November 30, 1979 remanded the matter to the Presiding Judge for further proceedings. On January 17, 1980, counsel for the Secretary responded to the order of December 11, 1979 directing that he address the defenses and mitigating circumstances raised by the operator.

An independent evaluation and de novo review of the parties' submissions discloses that there is no dispute as to the material facts, and that the record supports the following findings of fact and conclusions of law:

1. Citation No. 015441 alleges failure to provide a working, audible reverse alarm on a front end loader as required by 30 CFR 77.410. The operator admits the fact of violation, but asserts in mitigation that the machine operator was the only person allowed in the pit so as to assure that no miner would possibly be harmed by the lack of an alarm. Counsel for the

Secretary does not dispute this. Thus, the record support a finding that the violation occurred as charged, that the operator was ordinarily negligent, and that the violation was non-serious. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of \$100.00 is warranted for the violation found.

2. Citation No. 015478 alleges failure to provide an approved sanitary toilet facility in a location convenient to the worksite as required by 30 CFR 71.500. The operator denies that a violation occurred, and maintains that a complete indoor bathroom was located within 50 feet of the haulage road leading to the worksite. The operator further claims that these facilities were approved by a previous inspector, and that they were also subsequently approved by the inspector who issued the instant Citation. Counsel for the Secretary does not deny this, but states merely that "the manner of compliance does not negate the existence of the violation," thus suggesting that a violation occurred solely because the facilities were not approved by the inspector at the time he issued the citation, notwithstanding his subsequent approval of the same facilities. I reject this contention. The record supports a finding that toilet facilities were provided in accordance with the requirements of the standard, and the citation should accordingly be vacated and the petition dismissed as to this charge.

3. Citation No. 015479 alleges failure to provide berms or guard on the outer bank of an elevated roadway as required by 30 CFR 77.1605(k). Counsel for the Secretary asserts that although the lack of berms or guards can create a serious risk of injury or death if equipment were to topple from the roadway, the operator was not negligent because winter snows had washed out the existing berms. The operator does not deny the fact of violation, but asserts that there were ruts made by the trucks at least 12 inches deep for the entire length of the roadway. Thus, the record supports a finding that the violation occurred as charged and that the violation was serious, but that the operator was not negligent since the condition was beyond its control. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of \$100.00 is warranted for the violation found.

4. Citation No. 015480 alleges failure to provide first aid equipment at or near a working place as required by 30 CFR 77.1707(a). Counsel for the Secretary asserts that although the operator was negligent in failing to provide such equipment, it is unlikely that serious injury or death would result from the violation. The operator does not deny the fact of violation, but states that the inspector arrived shortly after miners had moved to a new work site and that first aid equipment was located five minutes away at a previous site. Counsel for the Secretary does not dispute this. Thus, the record supports a finding that the violation occurred as charged and that the operator was negligent, but that the violation was non-serious. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of \$50.00 is warranted for the violation found.

5. Citations Nos. 015481 and 015483 allege failure to post safety regulations in conspicuous locations throughout the mine as required by 30 CFR 77.1708. Counsel for the Secretary maintains that this failure could result in injuries to the miners, and that the operator should be aware of the requirement and was therefore ordinarily negligent. The operator maintains that the subject mine employs only five miners and that the safety regulations were posted at the company garage where all personnel saw them each day. Since the standard apparently contemplates that safety regulations be posted at more than one conspicuous location, I find that the violations alleged did in fact occur. However, the record supports further findings that the operator did in fact have the safety regulations conspicuously posted at one place, and that the violations are purely technical in nature involving no negligence on the part of the operator. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of \$5.00 is warranted for the two violations found.

6. Citation No. 015487 alleges that compressed gas cylinders were lying on the ground and not secured in a safe manner as required by 30 CFR 77.208(d). Counsel for the Secretary maintains that failure to protect and secure these cylinders could result in serious injury, and that the operator was ordinarily negligent since the condition was obvious. The operator does not deny the fact of violation, but asserts that the cylinders were empty and not in use. Thus, the record supports findings that the violation occurred as charged, that

the operator was ordinarily negligent, and that the condition was non-serious and remote in that the only hazard presented was one of falling or tripping over the cylinders. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of \$25.00 is warranted for the violation found.

I further find that because there is no triable issue of fact, an evidentiary hearing is unnecessary to a prompt, just and practical disposition of this matter. *Reliable Coal Co.*, 1 IBMA 50, 65 (June 10, 1971); *Mitchell v. National Broadcasting Co.*, 533 F.2d 265, 271 (2d Cir. 1977); *Bell Telephone Company of Pa. v. FCC*, 503 F.2d 1250, 1267 n. 25 (3rd Cir. 1974), cert. den. 422 U.S. 1026, reh. den. 423 U.S. 886 (1975).

Accordingly, it is ORDERED that on or before Wednesday, February 13, 1980, the parties SHOW CAUSE why the foregoing findings as to liability and the penalties warranted should not be entered as the decision and order of the Presiding Judge in this matter with respect to the seven citations in question.

Joseph B. Kennedy  
Administrative Law Judge